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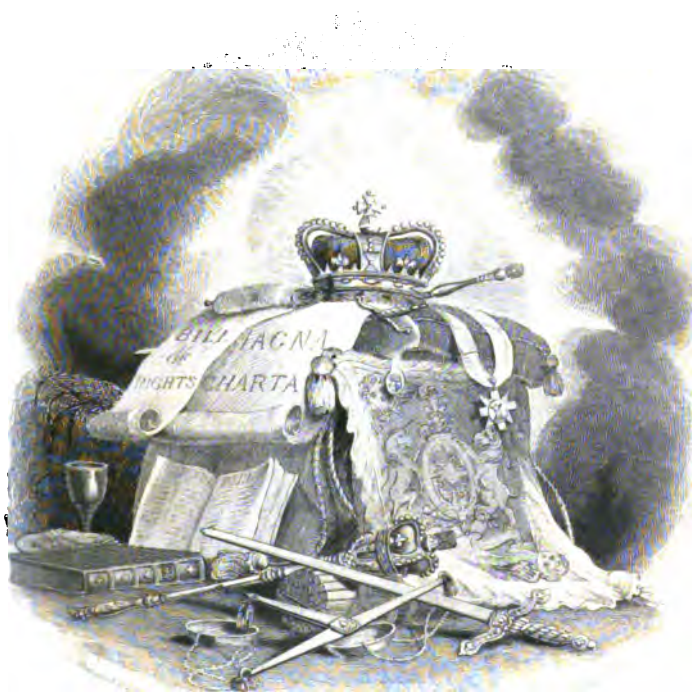
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THE  
BOOK  
OF THE  
CONSTITUTION.



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THE  
BOOK OF THE CONSTITUTION

OF  
GREAT BRITAIN:

CONTAINING  
A FULL ACCOUNT OF THE RISE, PROGRESS, AND PRESENT CONSTRUCTION

OF THE  
THREE ESTATES OF THE REALM,  
*King, Lords, and Commons;*  
OF THE VARIOUS COURTS OF JURISDICTION;

AND  
OF THOSE ACTS BY WHICH THE LIBERTIES OR RIGHTS OF  
THE SUBJECT ARE AFFECTED.

BY THOMAS STEPHEN,  
AUTHOR OF "THE HISTORY OF THE REFORMATION IN SCOTLAND," &c.

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## PREFACE.

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THE present work is intended to convey to the reader an account of the various fundamental laws, usages, offices, and institutions, which have arisen in this country in the course of ages, and which form what is called THE BRITISH CONSTITUTION. This "time-honoured" fabric has been more frequently the theme of admiration than of exposition. It was therefore conceived that a work intended to explain, in a full and candid manner, the essential parts of its construction, would have many claims on the attention of the public, both in point of interest and utility. The mixed character of the British constitution renders a proper understanding of it more difficult than that of any other government. In its composition, monarchy, aristocracy, and democracy are blended; and it differs from other governments in two important points; first, that much of the power which usually centres in the crown, in Britain remains in the hands of the nation; and, secondly, that the disposition of the executive officers to encroach on the rights of the people, is checked by the constitutional responsibility of each officer. To foreigners, it has long been an object of admiration: and a reflection on its many excellencies, so far as the rights and personal liberties of the subject are concerned, cannot fail, in this country, to excite a feeling of honourable pride.

The British constitution has grown out of occasions and emergency. It has gradually accommodated itself to change of circumstances and of national sentiment; to the fluctuating policy of different ages, and to the contentions and interests of various orders and parties in the state. "By the constitution of a country," says archdeacon Paley, "is meant so much of its law as relates to the

designation and form of the legislature; the rights and functions of the several parts of the legislative body; and the constitution, office, and jurisdiction of courts of justice. Accordingly," says he, "the constitution is one principal division, section, or title of the code of public laws, distinguished from the rest by the superior importance of the subject of which it treats. The terms, therefore, *constitutional* and *unconstitutional*, just mean *legal* and *illegal*. In Great Britain the system of public jurisdiction is composed of acts of parliament, of decisions of courts of law, and of immemorial usage." The benefit of laws and government is reaped by all. Few, however, consider the origin and fountain whence that benefit and those laws proceed. Paley observes, "that government was at first either parental or military." "Paternal authority," says he, "and the order of domestic life supplied the foundation of civil government. The condition of human infancy prepares men for Society, by combining individuals into small societies, and by placing them from the beginning under direction and control. A small family contains the rudiments of an empire. The authority of one over many, and the disposition to govern and be governed, are in this way incidental to the very nature, and co-eval with the existence of the human species. A parent would naturally," continues he, "retain a considerable portion of his authority after his children were grown up and had formed families of their own. This is the second stage in the progress of dominion. The first was that of a parent over his young children. The second that of an ancestor presiding over his adult children."

In the following pages several important acts of parliament will be found at full length. Others are abridged: but those which have tended to improve the laws, or protect persons or property, are given under the title "Rise, Progress, and Improvement of the Laws of England." The reform acts for the three kingdoms, and the burgh reform act for Scotland are given complete. The laws and institutions of Scotland are here exhibited more fully than they have hitherto been shown in any single publication. I have offered no opinions of my own on any of the subjects treated of. The prerogatives of the

crown, and the privileges of parliament are detailed in the language of Judge Blackstone and others.

To the politician, and every one, indeed, who takes an interest in public matters, the present work, it is presumed, must be highly acceptable. And even in the ordinary transactions of mankind, it must often prove of great utility, by explaining the legal rights of individuals, the limits of jurisdiction, and the power of courts, civil, military and ecclesiastical.

THOMAS STEPHEN.



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# BOOK OF THE CONSTITUTION.

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## INTRODUCTION.

THE British Constitution is worthy of being an object of inquiry to every man who lives under it, and even to foreigners who have no immediate connexion with it : remarkably distinguished as it undoubtedly is from all the free governments of powerful nations which history has recorded, by its exhibiting after the lapse of centuries no symptoms of irretrievable decay, but on the contrary the most expansive energy. In the ensuing work we will trace the gradual formation of this system of government, and exhibit the whole machinery of the constitution.

There are but three kinds of governments. When the sovereign power is vested in one person, it is called a monarchy : if in all the nobles, it is called an aristocracy, or an oligarchy if confined to a few of these : if an assembly of the people have the chief authority, it is called a democracy or a republic. Of all the different species of governments the monarchical is the most ancient and natural, originating at first in parental authority, hence kings are called the fathers of their people. The Assyrian and Egyptian monarchies are the most ancient that we read of, but there are several kings mentioned in the scriptures in the early history of the patriarch Abraham. The Jews were governed by God himself till Saul's time, from whence it has been called a Theocracy ; after his elevation to the throne of Israel by God's appointment, the government continued monarchical till the destruction of the temple. Some monarchies are despotic, where the subjects are slaves at the arbitrary power and will of their sovereign ; such as the Turks, and other Asiatic nations : others political or paternal, where the subjects, like children under a father, are governed by equal and just laws, consented to and sworn by all Christian princes at their coronations. Some monarchies are hereditary, where the crown descends either to male heirs only, as in France, or to the next of blood, as in Great Britain, Spain, Portugal, &c. ; others elective, where upon the death of the reigning prince, without respect to their heirs or next of blood, another by solemn election is appointed to succeed them. This used to be the system in Poland before its partition, and formerly also in Denmark, Hungary, and Bohemia, and is still practised in the United States of America ; for although their chief governor is called a president, still he is their sovereign, and is elective.

Some hereditary paternal monarchies are dependent and held of earthly potentates, consequently are obliged to do homage for their crowns. The little island of Man was called a kingdom, and held in *capite* of the crown of Great Britain; the kingdom of Naples holds of the pope, and pays him an annual tribute. Others are independent, acknowledging no earthly superior, but hold from God only, hence the words *Dei gratia*, by the grace of God, on their coins.

The kingdom of Great Britain is an hereditary paternal monarchy, governed by one supreme independent Head agreeable to the known laws and customs of the kingdom. It is a free monarchy, challenging above all other European kingdoms a perfect freedom from any subjection to the laws of the empire of Germany: for the Roman Emperors obtained anciently the dominion of this land by force of arms, but afterwards abandoning the same, by the law of nations the right returned to their former owners. The British crown is entirely free from the least shadow of subjection to the bishop of Rome, and is thereby relieved from many burdens and imposts under which other kingdoms groan; such as Appeals to Rome in ecclesiastical suits, Provisions, Dispensations, Confirmations, Bulls, &c. besides several tributes and taxes paid to the Pope. There is no interregnum, which saves us from the evils attending elective monarchies. By the necessary concurrence of the Lords and Commons in making and repealing all Statutes or Acts of Parliament, our monarchy has the double advantage of an aristocracy and also of a democracy, without the disadvantages of either: contributing by this happy blending of the three powers to the industry, liberty and happiness of the people. Both England and Scotland have been governed by kings as far back as history or tradition can carry us, without any attempt at a change so that we seem to be naturally inclined to this sort of government.

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## THE FEUDAL SYSTEM.

THE Feudal System was so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations, in the western parts of the Old World. The essential principle of a fief was a mutual contract of support and fidelity. Whatever obligations of service to his lord it laid upon the vassal, corresponding duties of protection, were imposed by it on the lord towards his vassal. If these were transgressed on either side, the one forfeited his land, the other his seigniorship or rights over it. Nor were motives of interest left alone to operate in securing the feudal connexion. The associations founded

upon ancient custom and friendly attachment, the impulses of gratitude and honour, the dread of infamy, the sanctions of religion, were all employed to strengthen these ties, and to render them equally powerful with the relations of nature, and far more so than those of political society. It is a question agitated among the feudal lawyers whether a vassal is bound to follow his lord's standard against his own kindred, but a much more important one, whether he must do so against the king. In the works of those who wrote when the feudal system was declining, this is commonly decided in the negative, and to be equally rebellion in the vassal as in the lord.

But the feudal polity, which was by degrees established over all the continent of Europe, was not received in England till after the conquest, when William the Norman introduced it. But the Conqueror does not appear to have effected the introduction of feudal tenures immediately, and when he did accomplish it, it was not by an act of his own arbitrary will, but was gradually established by the Norman barons, and others in such forfeited lands as they had received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation, long after his title was secured, and himself firmly seated on that throne which is still filled by his descendants.

And although the era of this great revolution in landed property cannot be exactly ascertained, yet there are some circumstances that may lead to a probable conjecture towards it. For we learn from the Saxon chronicle, that in the nineteenth year of King William's reign, an invasion was apprehended from Denmark; and the Saxon military constitution being then laid aside, and none other being introduced in its place, the kingdom was wholly defenceless, which obliged William to bring over a large army of Normans, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and more readily incline the barons to listen to his proposals for putting them in a posture of defence. For as soon as the danger was over, the king held a great council to inquire into the state of the nation; the immediate consequence of which was the compilation of the great survey called Domesday-Book, which was finished in the following year; and in the latter end of that very year, the king was attended by all his nobility at Sarum, which does not appear to have been at that time a rotten borough, but of sufficient importance for a parliament to meet at it; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This new polity, therefore, seems not to have been altogether imposed by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as the other nations of

Europe had before adopted it, and upon the same principle of self-security.

In consequence of this change, it became a fundamental maxim and necessary principle of English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For, this being really the case in pure, original, proper feuds, other nations which adopted this system, were obliged to act upon the same supposition as a subtraction and foundation of their new polity. And indeed, by their consenting to the introduction of feudal tenures, our ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system, and to oblige themselves (in respect of their lands) to maintain the king's title and territories with equal vigour and fealty, as if they had received the lands from his bounty, upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to the proceeding, and therefore took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services as were never known to other nations, as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

The grand and fundamental maxim of all feudal tenures, is this, that all lands were originally granted out by the sovereign, and are, therefore, holden either mediately or immediately of the crown. The granter was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or feu: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or *vassal*, which was only another name for the tenant or holder of the land; though on account of the prejudices we have conceived against the doctrines that were afterwards grafted on this system, we now use the word *vassal* opprobriously, as synonymous with slave or bondman. The manner of the grant was words of pure donation, *dedi et concessi*, which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known: and therefore, the evidence of property was reposed in the memory of the neighbourhood, who in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant, upon investiture, usually did *homage* to his lord ; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord who sat before him ; and there professing that “ he did become his *man* from that day forth, of life and limb and earthly honour :” and then he received a kiss from his lord.

The ceremonies used in conferring a fief were principally three : homage, fealty, and investiture. 1. The first was designed as a significant expression of the submission and devotedness of the vassal towards his lord. In performing homage his head was uncovered, his belt ungirt, his sword and spurs removed ; he placed his hands, kneeling, between those of the lord and promised to become his man from thenceforth ; to serve him with life and limb and worldly honour, faithfully and loyally, in consideration of the lands which he held under him. None but the lord in person could accept homage, which was commonly concluded with a kiss. 2. An oath of fealty was indispensable in every fief ; but the ceremony was less peculiar than that of homage, and it might be received by proxy. It was taken by the clergy, but not by minors ; and in language, differed little from the form of homage. 3. Investiture, or the actual conveyance of feudal lands, was of two kinds, proper and improper. The first was an actual putting in possession on the ground, either by the lord or his deputy ; which is called in law, livery of seisin. The second was symbolical, and consisted in the delivery of a turf, a stone, a wand, a branch, or whatever else might have been made usual by the caprice of local customs. Immediately upon investiture the vassal's duties commenced. These it is impossible to define or enumerate ; because the services of military tenure, were in their nature uncertain, and distinguished as such, from those incident to feuds of an inferior description. It was a breach of faith to divulge the lord's counsel, to conceal the machinations of others from him, to injure his person and fortune, or to violate the sanctity of his roof and the honour of his family. In battle he was bound to lend his horse to his lord, when dismounted ; to adhere to his side while fighting ; and go into captivity as a hostage for him, when taken.

The lord was, in early times, the legislator and judge over all his feudatories ; and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts baron, (which were instituted in every manor or barony for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow tenants, and upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of the *peers* of the court : *pares curtis* or *pares curiar*.



These were the principal and very simple qualities of the genuine or original feuds, being then all of a military nature, and in the hands of military persons ; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants, obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction ; which returns, or *reditus*, were the original of rents. And by this means the feudal polity was greatly extended ; these inferior feudatories (who held what are called in Scots law, "*recre-feifs*") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent service, and to promote the welfare of their immediate superiors or lords. But this at the same time demolished the ancient simplicity of feuds ; and an inroad being once made upon their constitution, it subjected them in course of time to great varieties and innovations. Feuds came to be bought and sold, and other deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred, when the feuds themselves no longer continued to be purely military.

But as soon as the feudal system came to be considered in the light of a civil establishment rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject ; in pursuance of which the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial both to the lord and tenant, and prudently calculated for their mutual protection and defence.

In England there seems to have subsisted four principal species of lay tenures, to which all others may be reduced ; the grand criterion of which were, the natures of the several services or renders, that were due to the lords from their tenants. The services in respect of their quality were either *free* or *base* services, in respect of their quantity and the time of exacting them were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank, as to plough his lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence ; as to pay stated annual rent, or to plough such a held for three days. The *uncertain* depended upon unknown contingencies ; as to do military service in person, or to pay an assessment in lieu of it, when called upon, or to wind a horn whenever the Scots invaded the realm

of England, which were free services, or to do whatever the lord should command, which was a base or villein service.

Forty days was the term generally settled as the measure of military service, during which time the tenant of a knight's fee was bound to be in the field at his own expense. But the length of service diminished with the quantity of land: for half a knight's fee, but twenty days of service in the field were due; for an eighth part, but five days; and when this was commuted for an escuage or pecuniary assessment, the same proportion was observed. Men turned of sixty, public magistrates, and women of course, were free from personal service, but obliged to send substitutes. A failure in this primary duty incurred perhaps strictly a forfeiture of the fief; but it was usual for the lord to amerce such vassals, which was called an escuage. The Highland Clans followed their chief into the field, and likewise the Irish, but their tie was the double one of relationship as well as vassalage. The chieftain exercising the original patriarchal government over his descendents, and followers. The feudal system did not exist till after the conquest; and the kings of Scotland borrowed it, as they did many other institutions, from England.

FRANKALMOIGN was a tenure peculiar to the clergy, and Lord Coke says, "no lay person can hold in *frankalmoign*;" and according to Lyttleton, on whom he comments, a tenant in *frankalmoign* is "where an abbot or prior, or other man of religion, or of holy church, holdeth of his lord in *free alms*." The same author says that the service required by this species of tenure was, "that they which hold in *frankalmoign* are bound before God to make orisons, prayers, masses, and other divine services for the souls of their granters or feoffers, and for the souls of their heirs which were dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord, because that this divine service is better for them before God than any doing of fealty, and also because the words *frankalmoign* exclude an earthly or temporal service." Under the Saxon monarchy, all the bishops of England, and such abbots and priors as held their lands of the crown, held by this tenure. The change of those estates into baronies, subject to homage and fealty, and held of the king by knight service, was an important alteration, made by William I., in the English constitution. But it was not understood that religious persons were bound by this change, to perform military service like temporal barons. They were either to find other men to do the duty for them, or to compound for their service by fines to our sovereign lord the king. It would have been indecent and inconsistent with their sacred calling, to have obliged ecclesiastics to bear arms, and therefore, in accordance with the wisdom and decorum of the law, they were put upon the same footing as women possessed of knights' fees. But there was no impropriety in their being required to find

the king, of whom they held their baronies, either soldiers or money in lieu of their personal services.

**SOCAGE.** Sir T. Lyttleton says, that every tenure which is not tenure in chivalry, is a tenure in socage; and that a tenure in socage is where the tenant holdeth of his lord the tenancy by *certain service*, for all manner of services. Sir H. Spelman observes, from the ancient book of St Albans, that *socmen* (or tenants in socage) signified freeman in the genuine sense of the word. All the king's *tenants in ancient demesne* held of him by socage tenure; in some points it appears that they had more liberty than the military tenants, that is, the feudal bonds were less strict on them and their families, though the tenants by *knights' service* was the higher and more honourable service. In Doomsday-Book, they are distinguished from other free tenants, by the denomination of *liberi homines*, not having the power which the knight-service tenants possessed, of giving away or selling their estates, without permission from their lords. It seems that these *liberi homines* were a remainder of the *allodial* tenants of the Saxon *fokland*, that is, land of the vulgar, as opposed to *bockland*, or *thaneland*. A certain number of them was necessary to constitute a manor, and therefore when that number was incomplete, some who held in villeinage were enfranchised, to make it up. Sometimes those who were in possession of this *allodial* freedom, found it necessary to seek a defence and protection, by placing themselves under the protection of some feudal lord, or even of two lords, if the situation of their lands made it necessary for them to have two protectors. It is probable, that this practice becoming more general, in process of time, put an end to this species of tenure. Their real services to the lord of the manor in their allodial state, were predial and rustic. A certain number of *free socmen* (as well as these) appears to have been necessary to every lord of a manor, for holding the pleas of the manor court, which the Saxons called *sok* or *soc*, a word signifying a franchise, or jurisdiction to which a franchise was annexed. And it is evidently from this that the words *socmen* and *socage* were derived. Some of the lands held in *socage* were held by base services, and at the will of the lords, but the definition given of it by Lyttleton, and other great authorities, excludes from it all tenures where the service was uncertain. Among the legantine canons made at London by the bishop of Winchester, in the reign of king Stephen, Lord Lyttleton produces one which says, "that the plough and husbandmen in the fields should enjoy the same peace as if they were in the churchyard." This sanctuary given to the cultivators of the soil on their own grounds, might, if duly regarded, have been of immense benefit to the people. But unfortunately, the civil wars which so often scourged the kingdom, paid little respect to either spiritual or temporal laws. According to Lyttleton, *burgage tenure* was one kind of socage, but with various customs.

The statute of the 12th of Charles II. entirely changed this constitution

of property : it declared " that all tenures by knights' service of the king, or of any other person, and by knights' service *in capite*, and by soccage *in capite* of the king, and the fruits and consequences thereof, shall be taken away or discharged, and that all tenures of any honours, manors, lands, tenements, hereditaments, &c. are turned into free and common soccage : " Thus, says my Lord Lyttleton in his history of the life and reign of Henry II. " extending that tenure, which, for several ages, was reckoned comparatively mean and ignoble, to all estates of our nobility and gentry, who would have anciently thought it the greatest injury and dishonour to have had their possessions so levelled with those of the vulgar. Yet to this change, which a gradual alteration of manners and juster notions of government had prepared us to receive, is owing much of the happiness of our present condition. But, at the same time, it has obliged us to seek for other methods of giving a military strength to the kingdom consistent with our monarchy, and not dangerous to our freedom : a matter of no little difficulty, but which, if brought to perfection, would secure and perpetuate the advantages, which we have over our ancestors, in the civil policy of the kingdom."

**VILLEINS.** In Doomsday-Book, a distinction is made between villeins who were affixed to a manor, and others of a still lower and more servile condition, distinguished by the names of *bordarii*, *cotarii*, and *servi* ; the two first of which seem to have rented small portions of land, and the last to have been hinds, or menial servants, residing in the families of their lords. If a *free* woman was married to a *villein* by birth, she lost her freedom during the life of her husband, and the children of such marriage became also slaves, and which state of servitude continued to all succeeding generations, unless their lord enfranchised them by his own act. Glanville says, that in his time, if a freeman married a woman born in villeinage, and who actually lived in that state, he thereby lost the benefit of the law, (that is, all the legal rights of a freeman,) and was considered as a villein by birth, during the lifetime of his wife, on account of her villeinage. And that if a man, born in villeinage, had children by a woman born in the same state, under a different lord, the children ought to be equally divided between the two lords. This is absolutely putting children on the same foot as cattle, and is more unnatural than our present laws of slavery in the West India Colonies, where in such a case as that now mentioned, the children are always esteemed, without challenge, the property of the mother's lord.

There were several methods of enfranchising villeins. If his lord, being willing to give him his freedom, had proclaimed him free from all right that he or his heirs might have to him, or had given or sold him to another, *for the purpose of being enfranchised*. But according to Glanville, no villein could purchase his freedom with his own money, because all the goods belonging to a villein born belonged to his lord, and therefore he

could not redeem himself with his master's money ; but he might with the money of another man. In this respect also our negro slaves have an advantage over the old English slaves, for their property is absolutely their own, and guaranteed to them by the colonial laws. The same author says, "that if a villein born had remained quietly, (that is, unclaimed by his lord,) a year and a day, in any *privileged town* ; so that he had been received into their community or *gyld*, as a citizen, he was thereby freed from his villeinage." A *privileged town* is one that had franchises by prescription or charter. According to lord chief justice Bracton, a *quiet* residence of a year and a day, on the king's demesne lands, would also enfranchise a villein who had fled from his lord. There is a law of William the Conqueror, where it is enacted, "that if any one is willing to free his slave, let him deliver him by his right hand to the sheriff, in full county court, and proclaim him discharged by manumission, from the yoke of his servitude ; and let him show him the doors open and his way free, and put into his hands *the arms of a free man*, namely a lance and a sword, which being done, he is made a freeman." Bracton relates, that the lives and limbs of slaves were under the king's protection, so that if a lord killed his slave, he should suffer the same punishment as if he had killed any other person. The chastity of female slaves was likewise protected from all violence by the laws of those times, and the goods of villeins were secured against all others, except their lords.

**HOMAGE.** Homage was done by the vassal on his knees, unarmed and bareheaded, and holding both his hands between those of his lord, who was sitting : which ceremonies denoted, (according to Bracton,) on the part of the lord, protection, defence, and warranty ; on the part of the tenant, reverence and subjection. In a statute of 17 Edward II., there is a set form of words to be used by the vassal, where homage was done to a subject. Kneeling before his lord, as before related, he was to say, "I become your man from this day forward, of life, limb, and earthly honour ; I will be true and faithful to you, and bear to you faith for the lands I hold of you, saving my faith to our lord the king and his heirs." After repeating these words, the lord kissed the vassal, who then rose up and took the oath of fealty as follows : "Hear this, my lord, that I will be faithful and loyal to you, and will bear to you faith for the tenements which I hold of you, and loyally will perform to you the customs and services which I owe to you, at the terms assigned, so help me God and his saints."

Homage done to the king was called *leige homage*, and was accompanied with the oath of allegiance expressed in these words ; "I become your liege man, of life and limb, and of earthly worship ; and faith and troth I shall bear unto you, to live and die against all manner of folk, so help me God." The ceremony was precisely the same otherwise, as in doing homage to a meane lord. In the year 1039, Anselm, on being promoted to the see of Can-

terbury, refused to do homage to Henry I., because some popes, and councils held under their influence, had prohibited ecclesiastics from making such an acknowledgment to princes. Anselm declared, that "he would not become the man of any mortal, nor swear fealty to any;" in which resolution he was zealously supported by the whole strength of the papacy; but after a long and severe contest, pope Paschal II. conceded that the bishops *elect* might do homage and take the oath of fealty, *before* they were consecrated. This was confirmed by the Constitutions of Clarendon, where a dangerous clause, *saving his order*, was allowed to be inserted; all obligations contracted by the oath, might, according to the doctrines of the Church of Rome, be eluded and cancelled by means of this clause; and in the dispute between Becket and Henry II., the former expressly pleaded it in justification of his own rebellion.

**KNIGHTHOOD.**—The very singular spirit of chivalry, which began to display itself about the era of the Conquest, was introduced by the Normans, and gave an entirely new turn to the education of the young nobility and gentry, preparatory to their obtaining the honour of knighthood, which was then, and for ages afterwards, an object of ambition to the greatest princes. At his first entrance into the school of chivalry, a young aspirant acted in the capacity of a page; in which situation he was instructed in the laws of courtesy and politeness, and in the first rudiments of chivalry and martial exercises, to fit him to shine in courts, at tournaments, and on the field of battle. After spending some years in the station of a page, he was advanced to the more honourable rank of an esquire, admitted into more familiar intercourse with the knights and ladies of the court, and perfected in dancing, riding, hawking, hunting, tilting, and other knightly accomplishments. In short, as the courts of princes and the greater barons were a sort of colleges of chivalry, as the universities were of the arts and sciences; after spending seven or eight years in the capacity of esquire, he received the honour of knighthood, commonly from the hands of the prince, earl, or baron in whose court he had spent his youth, and received his education. When the honour of knighthood was conferred, it was accompanied with a solemn religious engagement. Some eminent writers have been of opinion, that the origin of knighthood was a voluntary association of private men for defence, but more especially for the defence of unprotected females, from the many grievous disorders that infested all Europe on the decline of the dynasty of Charlemagne. Others are inclined to derive it from a custom observed by Tacitus among the ancient Germans, of bestowing arms on their young men in the public assemblies, and the adoption *per arma*, practised by the Goths, and some barbarous nations. However that may be, it is probable, that the confusion and violence of those times made the order of knighthood more general, as being more necessary;



and might also occasion its consecration by solemn vows and religious rites and ceremonies. Lord Lyttleton says, the first mention made of those ceremonies in England, is by Ingulphus, who wrote in the reign of William the conqueror. He says it was the custom of the Saxons in England, that the knight elect should prepare for knighthood by confession and absolution of his sins the evening before, and afterwards by watching all night in the church ; that in the morning he should offer his sword on the altar, and again receive it, blessed, from the priest ; afterwards he should hear mass and receive the sacrament, when the priest placed his good sword about his neck, accompanied with a benediction to himself. But the Normans abominated this manner of consecrating the knights, despised those who were so made, and altered the custom. Other ceremonies were practised, yet the sword still continued to be received from the altar. The candidate was bathed to betoken purity, after which he was girded with his sword, a pair of gilt spurs were affixed to his heels, and the person conferring struck him gently on the neck, head or shoulders, saying, "*In the name of God, St Michael and St George, I make thee a knight ; be thou brave, hardy, and loyal.*" A gorgeous robe of scarlet or green was afterwards flung round his shoulders, and the whole solemnity was graced with the presence of the fair sex, the songs and music of minstrels, and other marks of rejoicing and honour. An esquire was not permitted to wear any gold, nor the same dress as the knight, even although they were of the highest quality.

In time of war and actual service, the usual forms were much abridged. The person to be knighted presented a sword to the king, or commander-in-chief, if the king was not with the army, and desired to receive the order of knighthood, which was bestowed with no other ceremony, than a stroke on the neck with that sword. Before an assault, or any perilous action, it was customary to make a number of knights in this manner, as an encouragement to those who were thus chosen out from all the esquires there present, to act not unworthily of the dignity they received. The same thing was done at the conclusion of a battle or siege, or other military exploit, as a reward to those who had distinguished themselves by their valour. And this was justly esteemed the most honourable knighthood. In France the order was given with the following words ; "*I make thee a knight in the name of God and my lord St George, to maintain the faith and justice loyally, and defend the church, women, widows, and orphans.*"—*Mons. La Curne de Sainte Paylaye*, in his *Memoirs of Ancient Chivalry*, describes the ceremony of knighthood to have been preceded by seven fastings ; nights spent in prayer in a church or chapel ; penance, and the eucharist received with devotion ; bathing, and putting on white robes, as emblems of that purity of manners required by the laws of chivalry ; confession of all their sins ; with serious attention to several sermons, in which the faith and morals of a good Christian were explained. When a candidate for the honour of

knighthood had performed all these preliminaries, he went in procession into a church, and advanced to the altar with his sword slung in a scarf about his neck. He presented his sword to the priest, who blessed it, and put it again into the scarf, about the neck of the candidate; who thence proceeded in a solemn pace, with his hands joined, to the place where he was to be knighted. This august ceremony was most commonly performed in a church or chapel, in the great hall of a palace or castle, or in the open air. When the candidate approached the personage by whom he was to be knighted, he fell on his knees at his feet, and delivered to him his sword. Being asked for what end he desired the honour of knighthood? and having returned a proper answer, the usual oath was administered to him with great solemnity. After this, knights and ladies, who assisted at the ceremony, began to adorn the candidate with the armour and ensigns of knighthood. First, they put on his spurs, beginning with the left foot; next his coat-of-mail; then his cuirass; afterwards the several pieces of armour for his arms, hands, legs, and thighs; and, last of all, they girt him with the sword. When the candidate was thus *dubbed*, as it was called, the king, prince, or baron, who was to make him a knight, descended from his throne or seat, and gave him, still on his knees, the *accolade*, which was three gentle strokes, with the flat of his sword, on the shoulder, or with the palm of his hand, on the cheek, saying, at the same time, "*In the name of God, St Michael, and St George, I make thee a knight; be thou brave, hardy, and loyal.*" The new knight was then raised from the ground, his helmet put on, his shield and lance delivered to him, and his horse brought; which he mounted without using the stirrup, and performed several courses, displaying his dexterity in horsemanship, and in the management of his arms, amidst the acclamation of the spectators. No institution could have been better adapted, in these rude times, for inflaming the minds of the warlike nobility with ardour to acquire those accomplishments, which were indispensable in the character of a true knight; which were beauty, strength, and agility of body; great dexterity in dancing, wrestling, hunting, hawking, riding, tilting, and every other manly exercise; also the virtues of piety, chastity, modesty; and, above all, an inviolable attachment to truth, and invincible courage. A knight was tacitly bound to the especial defence and protection of the church. The ceremony of taking their swords from the altar, and the priest's solemn benediction, indicated their being enlisted in the service of the altar, the assistance of the poor and oppressed, the punishment of evil doers, and the emancipation of all from tyranny and wrong. But it frequently happened that many of these knights acted as if their vow had been quite the contrary, especially with respect to the church.

Every knight had a power, inherent in himself, of making other knights, not only in his own country, but wherever he went; and what seems more

extraordinary, was sometimes conferred in England, by those who were not knights themselves, and were indeed incapable of that honour, as bishops and abbots. William Rufus was knighted in his father's lifetime by Lanfranc, archbishop of Canterbury. The foundation of this privilege must undoubtedly have been a notion, that the order being conferred with sacred rites and forms of prayer, was a kind of religious institution. During the reign of king Stephen, the earl of Gloucester knighted his brother, afterwards earl of Cornwall, and history exhibits many examples of this power or privilege having been exercised by private persons in England, without the authority of a royal commission. Some English kings have themselves been knighted by the "honour-giving hands" of their subjects. This order was conferred on Henry VI. by the duke of Bedford, and on Edward VI. by the duke of Somerset. Knighthood was therefore distinguished from all other honours and dignities in the state by this remarkable difference, that those were derived from the king, as their fountain and head, but this might be conferred on the king himself, by his subjects. It might also be given by any sovereign prince in the territory of another, and the rank assigned to it was the same in all Christian countries. Among the early Norman monarchs, even enfranchised villeins born in servitude were sometimes knighted, when they had performed some very extraordinary actions in war, after having obtained their freedom.

CONSTABLE.—William the Conqueror rendered many of the household offices hereditary, which considerably increased the power of the nobility; among these were the offices of the Constable, Chamberlain, and Seneschal. In the 13 statute of Richard II., the authority and jurisdiction belonging to the office of the Constable of England, is partly defined; it is there said, "That he ought to have cognizance of contracts touching feats of arms and of war out of the realm, and also of such things relating to arms or war within the realm, as could not be determined or discussed by the common law, with other usages and customs appertaining to the same matters, which other constables before that time had duly and reasonably used." Madox, in his history of the Exchequer, says, "he was a high officer both in war and peace, and observes that the word signifies a captain or commander. Yet it did not always follow that the Constable commanded the royal armies in the absence of the sovereign. Henry de Essex and Humphrey de Bohun, who were Constables in Henry II.'s reign, never commanded in chief. Henry de Essex was the hereditary standard-bearer of England, but it does not very clearly appear whether that honour belonged to him as Constable, or was a distinct office held by a different tenure in conjunction with the other. He forfeited the dignity of Constable in consequence of a duel which he fought with Robert de Montfort. Humphrey de Bohun afterwards acquired the dignity of Constable by virtue of his marriage with Margaret, eldest daughter of Milo,

earl of Hereford, who, by the death of her brothers, became the heiress of all her father's honours, of which the office of Constable was one. It is not related how it had come into the family of Hereford, but it is most likely that after the forfeiture of Henry de Essex, the office had been conferred on the earl of Hereford. But from the time of the marriage just named, the Bohuns possessed that high dignity for ten generations. It appears by a record that, in the reign of Edward III., Humphrey de Bohun, the last of that name, held several manors by the service of being Constable of England. And in the reign of Henry VIII., it was decreed by all the judges, "That this office might be annexed to lands, and descend even to females, who, while they remained unmarried, might appoint a deputy to do the service for them; but after marriage it was to be done by the husband of the eldest alone." They also decreed, "That the service was not extinct, though part of the lands for which it was done, fell into the hands of the king, to whom it was due, but remained entire in the eldest daughter; yet that the king might refuse the service, and not be forced to use the ministry of an unworthy person." Of which decision Henry took advantage to reject the claim of the duke of Buckingham, who derived his title to it from the eldest daughter of the last Humphrey de Bohun. After the death of that duke, the office was never revived. An old author, in describing the business done by the Constable at the Exchequer, where he had a seat by virtue of his office, says, "that when the king's *mercenary* soldiers came there to receive their pay, it was his duty to examine their demands and accounts, with the help of his clerk, and see that the sums due to them were paid at the proper terms."

In Scotland, the earl of Errol is hereditary lord high Constable, and the powers attached to that office are very transcendent. In all royal armies and expeditions, the Constable was lieutenant-general, and supreme officer next the king. He had the command, direction, and government in the army, and was sole judge in all military affairs. He was, (and still is at present, when the king resides in Scotland,) supreme judge in all cases of riot, disorder, blood, and slaughter committed within four miles of the king's person, or of the parliament, or of the council representing it. He guards the king's person in time of parliament, keeps the parliament house, and commands all guards and men at arms attending the king's person at such times. He rides on the king's right hand, and carries a white baton in token of command, sits in parliament apart from the rest of the nobility, on the king's right hand, having the regalia lying before him.

By the statute 13 Edward I. made at Winchester, it is enacted, "In every hundred and franchise, two constables shall be chosen to make the view of armour, and they shall present defaults of armour, and of suits of towns, and of highways, and such as lodge strangers in uplandish towns, for whom they will not answer."

At the present day, the chief business of a high constable is not appropriated to them as such, but only as officers to execute the precepts of justices of the peace. The original and proper authority of a high constable seems to have been precisely the same as that of a petty constable. The surveying of bridges, the issuing of precepts regarding the appointment of overseers for the poor, surveying of highways, assessing the land tax and window duties, the viewing of armour, are official duties vested in him as matters of convenience and not of necessity, and which is a matter of discretion with justices of the peace whom they will appoint. Also as a matter of convenience, other duties have been superadded to this office, by different acts of parliament, such as the issuing precepts for licensing ale-houses, for levying county rates, and for returning lists of jurors.

All the inhabitants of a town are liable in turn to serve the office of high constable, but to this there are of course exceptions. The president, commons, and fellows of the faculty of physic in London, are exempt, also surgeons in London, apothecaries in, and for several miles round London, and in the country also, where they have a seven years' apprenticeship. A sworn attorney or other officer of the courts at Westminster, may be chosen, but can be discharged from serving by a writ of privilege, as his attendance on the courts being indispensable, incapacitates him from performing the necessary duties of the office; barristers and the servants of members of parliament are likewise for the same reasons exempt. Aldermen of London, although chosen, cannot be compelled to serve; officers of the guards are not exempt from serving, although both officers and men of the militia are. The clergy, and all dissenting preachers, after subscribing and taking the oaths, are exempt; so likewise is the prosecutor of a felon to conviction.

This office being entirely ministerial, and noways judicial, a constable may appoint a deputy, in the case of sickness or absence, or any other cause, but he must answer for the faithful execution of his office by his deputy. Dissenters who scruple to take the oaths may also appoint a deputy.

By the common law every high and petty constable are conservators of the peace. And therefore whoever makes any affray or assault on another person in the presence of a constable, or threatens to kill, beat, or hurt another, or in any way breaks the peace, he may commit such offender to the stocks, or any place of custody, and afterwards carry him before a justice or to jail, until he finds security to keep the peace. But a constable, not being a judge of record, cannot take any man's oath for an offence not committed in his own view.

When a constable is chosen, and on entry to his office, he takes the following oath:

"You shall well and truly serve our sovereign lord the king in the office

of Constable, for the township of ———, for the year ensuing, (or until you be lawfully discharged therefrom, or until another shall be sworn in your place;) you shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge. So help you God."

**MARESCHAL OF ENGLAND.**—This office was executed partly in the king's army in time of war, and partly in his court in time of peace. His military functions consisted partly in conjunction with the constable in giving certificates to the barons of their having duly performed the services required of them in the king's armies, from which it would appear that these officers had a legal superintendency over the royal army. It appears, however, from Rymer, that in Edward I.'s reign, the Mareschal's post was in the vanguard, and that it was his duty as well as the Constable's, to muster the forces. Mr Madox (*Hist. of the Exch.*) relates that his civil duties were to provide for the security of the king's person in his palace, to distribute the lodgings there, to preserve the peace and order in the king's household, and to determine controversies arising among them. He also performed certain acts either by himself or his substitutes at the king's coronation, at the marriages and interments of any member of the royal family, at the creation of barons and knights, and at other great and ceremonious assemblies of the king's court. It is said in the dialogue *de Scaccario*, that no business of importance ought to be done without consulting the mareschal. In the reign of Henry II., this high office was held by a family who seems to have taken their name from thence, and were only of the rank of barons; but under Richard I., William Mareschal having obtained the earldom of Pembroke, was afterwards styled Earl Mareschal: and as from that time this office has continued in the possession of earls, though of different houses, it is now always called the office of Earl Mareschal: and its power seems to have increased from the dignity of the noblemen who have held it. At present the duke of Norfolk is hereditary Earl Mareschal of England. Originally it signified master of the horse to the king.

**SENECHAL.**—The office of seneschal was much the same as that of grand justiciary, and indeed they were so closely allied, that they could not very well subsist together, their functions and dignity being nearly the same. In the time of the early Norman sovereigns, it was inferior to the grand justiciary, and does not appear to have been very different from the office of lord steward of the household at present, but its jurisdiction afterwards was greatly increased.

**THE GRAND JUSTICIARY OF ENGLAND.**—Spelman says, that originally under this office were executed the several powers and functions of the chief justice of the king's bench, the chief justice of the common pleas, the chief baron of the exchequer, and the master of the wards. He was too great

for a subject ; but the office was neither hereditary nor held for life ; and he was obliged to appoint a number of deputies. Several persons were frequently found in commission in the execution of the office, which deprived it of its dangerous splendour. Mr Madox relates, (*Hist. of the Exch.*) that for some time after the conquest, the chief justiciary used to do many acts, which afterwards appertained to the treasurer's office. Notwithstanding, there was a treasurer then among the great officers of the king's court, of whose functions the same author gives this account. "It seems to have been the part or duty of the treasurer in ancient times, to act with the other barons of the exchequer in the government of the king's revenue, to examine and control accountants, to direct the entries made in the great roll, to attest the writs issued for levying the king's revenue, to supervise the issuing and receiving the king's treasure at the receipt of the exchequer, and in a word, to provide for, and take care of, the king's profit."

In the dialogue *de scaccario* it is stated, that the grand justiciary of England "was great in the exchequer as well as in the court, so that nothing of moment was or could be done there, without his consent or advice," and that he usually presided under the king in the court of exchequer ; next to him sat the chancellor, then the constable, then the chamberlain, and lastly the mareschal ; but the power of the justiciary declined in proportion as that of the chancellor increased, and it is supposed that the increase of power and splendour acquired by the chancellors was in a great measure owing to the greatness of some of the illustrious individuals who had borne that office. Madox likewise says, "that the splendour of the king's court appeared very much in the greatness of his officers and ministers. But some of them were so great and splendid, as instead of augmenting served to diminish the splendour of their master, and attract the eyes of his other subjects from himself to them ;" among which number was this office of grand justiciary, and perhaps that may have been one cause of its abolition.

Henry VIII. first appointed Lord Lieutenants of counties to act as representatives of the crown, to keep their respective counties in military order.

The English counties are divided into six circuits for the accommodation of the judges, called the Home, Norfolk, Western, Oxford, Midland, and Northern. Two judges are fixed to go upon each of these, at the assizes appointed to be held twice-a year ; but in the cities of Durham and Carlisle, the towns of Newcastle and Appleby, which are in the Northern and long circuits, the assizes are held only once a-year in autumn. Middlesex being the supreme court of justice, and Cheshire being a county palatine, have peculiar privileges, and therefore excluded from the circuits.

There are three counties which are pre-eminently called counties palatine, viz. Lancaster, Chester, and Durham, the two latter have been so

termed ever since the conquest ; and Lancaster was created a county palatine by Henry III., in favour of Edward Plantagenet, first earl and duke of Lancaster. Pembroke and Hexham also, were anciently counties palatine ; Hexham belonged to the archbishop of York, but was stripped of its privileges in the fourteenth year of Elizabeth's reign, and reduced to be part of the county of Northumberland. The power of Pembroke as a county palatine was abolished in the twenty-seventh year of Henry VIII.

**SHERIFFS.**—The Sheriff is an officer of very great antiquity, and performs all the king's business in the counties ; and although he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl ; the king, by his letters patent, committing *custodiam comitatus* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which, it was ordained, by statute 28, Edward I., that the people should elect their sheriffs in every shire, except where the shrievalty was hereditary in any family. In some counties the sheriffs were hereditary, as they still continue to be in the county of Westmoreland. In Scotland the sheriffs were hereditary, till the crown resumed that office after the attempt of prince Charles Edward to win the crown of his ancestors, and there the crown appoints deputies, who again appoint substitutes to act for them. The city of London has the inheritance of the shrievalty of Middlesex vested in their corporation by charter. But these popular elections growing tumultuous, they were put an end to by the statute 9 Edward II., which enacted that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons to whom the same trust might with confidence be reposed. And it is now customary, that all the judges, together with the other great officers and privy councillors, meet in the exchequer on the morrow of St Martin, and then and there the judges propose three persons to be reported to the king, who afterwards appoints one of them to be sheriff.

Sheriffs, by virtue of several old statutes, are to continue in their office only one year in England, and yet it is said that a sheriff may be appointed during the king's pleasure, and such is the form of the king's writ. No man who has served the office of sheriff for one year, can be compelled to serve the same again within three years after.

It is of the utmost importance to have the sheriff appointed according to law, when his power and duty is considered. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings value and under in his county court, and he has also a judicial power in divers other civil cases. He is likewise to decide the elections of knights of the shire, (subject to the control of the house of commons,) of



coroners, and of verderors ; to judge of the qualification of voters, and return such as he shall determine to be duly elected.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office. He may apprehend, and commit to prison, all persons who break or attempt to break the peace ; and may bind any one in recognizance to keep the king's peace. He not only may, but he is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. He is also to defend his county against any of the king's enemies when they come into the land ; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him ; which is called the *posse comitatus*, or power of the county : and this summons, every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment.

In his ministerial capacity, the sheriff is bound to execute all processes issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest and to take bail ; when the cause comes to trial, he must summon and return the jury ; when it is determined, he must see the judgment of the court carried into execution. In criminal cases, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extends to death itself.

As the king's bailiff, it is his business to preserve the king's rights within his bailiwick ; for so his county is frequently called in the writs. He must seize to the king's use all lands devolved to the crown by attainder or escheat ; must levy all fines and forfeitures ; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject ; and must also collect the king's rents within his bailiwick, if commanded by process from the Exchequer.

For the execution of these various offices, the sheriff has many inferior officers under him : as under sheriff, bailiff, and jailers : who must neither buy, sell, nor farm their offices, under forfeiture of £500.

The under sheriff usually performs all the duties of the office, a very few only excepted, where the personal presence of the high sheriff is necessary. But no under sheriff shall continue in his office more than one year, and if he does he forfeits £200. And no under sheriff shall practise as an attorney during the time he holds the office, for this would be a great inlet to partiality and oppression.

Bailiff's or sheriff's officers, are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein ; to summon juries, to attend the judges and justices of the assizes and quarter sessions, and also to

execute writs and processes in the several hundreds. But as they are generally plain men, and not thoroughly skilled in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them. The sheriff being answerable for their misdemeanours, the bailiffs are usually bound in an obligation with sureties for the due execution of their office, and thence are called bound bailiffs, which has been corrupted to the more homely appellation of *bum-bailiffs*.

Jailers are also the sheriff's servants, and he is responsible for their conduct. Their business is to keep all such persons in safety as are committed to them by lawful warrant; and if they suffer any such to escape, the sheriff shall answer to the king, if it be a criminal matter, or in a civil case, to the party injured. And to this end the sheriff must have lands sufficient within the county to answer to the king and his people. The abuses of jailers and sheriff's officers, towards the unfortunate persons in their custody, are well regulated and guarded against by various statutes. Jailers are not to suffer tipping or gaming, or the sale of any liquors in a prison under the penalty of £10.

**JUSTICES OF THE PEACE.**—The next species of subordinate magistrates, are justices of the peace, the principal of whom is the *custos rotulorum*, or keeper of the records of the county.

The king's majesty is by his office and dignity royal, the principal conservator of the peace within all his dominions, and may give authority to others to see the peace kept, and to punish such as break it: hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, and lord high constable of England, (when any such officers are in being,) and all the justices of the king's bench, (by virtue of their offices,) and the master of the rolls, (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all who break it, or bind them in recognizances to keep it; the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county, as is also the sheriff, and both of them may take a recognizance. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it.

These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges A. D. 1590. This appoints them all, jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanours; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence. When any justice intends to act under this commission, he sues

out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him, which done, he is at liberty to act.

It is now enacted that every justice, with some exceptions, shall have £100 *per annum*, clear of all deductions, and if he act without such qualification, he shall forfeit £100. And it is also provided, that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.

The office of these justices subsists only during the king's pleasure, and is determinable, 1. By the demise of the crown, that is, in six months after ; but if the same justice is put in commission by the successor, he is not obliged to sue out a new *dedimus*, or to swear again to his qualification ; nor by reason of any new commission, to take the oaths more than once during the same reign. 2. By express writ under the great seal, discharging any particular person from being any longer a justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it ; in as much as it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices, that are not included therein ; for two commissions cannot subsist at once. 5. By accession to the office of sheriff or coroner.

The power, office, and duty of a justice of the peace depends on his commission, and on the several statutes which have created objects of his jurisdiction. His commission first empowers him singly to conserve the peace, and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences, which is the ground of their jurisdiction at sessions.

**SURVEYORS OF HIGHWAYS.**—Every parish is bound of common right to keep the high roads that go through it in good and sufficient repair, unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person.

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways ; that is, of ways leading from one town to another, all which are now reduced into one act, 13 Geo. III., which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them, who is liable to penalties for non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways : all persons keeping draughts, (of three horses, &c.) or occupying lands,

being obliged to send a team for every draught, and for every £50 a-year, which they keep or occupy ; persons keeping less than a draught, or occupying less than £50 a-year, to contribute in a less proportion : and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer, but they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market town, must be made twenty feet wide at the least, if the fences will permit, and may be increased by the authority of two justices, at the expense of the parish, to the breadth of thirty feet. 3. The surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labour of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish in aid of the personal duty, not exceeding in any one year, together with the other highway rates, the sum of 9d. in the pound ; for the due application of which, they are accountable on oath. Turnpikes are now pretty generally introduced in aid of such rates, and the laws relating to them, depend principally on the particular powers granted in the several road acts, and upon some general provisions, which are extended to all turnpike roads in the kingdom by 13 Geo. III.

**CORONERS.**—Coroners were originally the principal conservators of the king's peace, and the name is derived from *Corona*, a crown, because by the common law they attended principally to the pleas of the crown. In virtue of his office, the lord chief justice of the king's bench is the chief coroner of England. Anciently the office of Coroner was held in such high estimation, that none under the degree of a knight could hold it. By the 14 Edward III., no coroner could be chosen unless he had in the same county sufficient land in fee to answer all manner of people.

The coroner is elected by the freeholders of the county in the county court, in pursuance of the king's writ issued from, and returnable to, the court of chancery. The demise of the king does not affect this officer ; he still continues *ad vitam aut culpam*, without any new election. After his election and return, he is sworn by the sheriff to the due execution of his office.

When any person comes by a violent or unnatural death, or if there be suspicion of such, the township is to give notice to the coroner ; and if this is neglected, and the body interred without due notification, or before the coroner's arrival, then the township is liable to be amerced. To bury any body which has met with a violent death before a coroner's inquest has sat upon it, is, according to chief justice Holt, indictable ; and also if the township shall suffer the body to lie unburied till it putrifies, without sending notice to the coroner, it is liable to be amerced.

On receiving notice, the former issues a precept to the constables of the next four, five, or six townships, to return twelve good and lawful men to

appear before him at such a place, to make inquisition into the cause of death ; and every one above the age of twelve years, is liable to serve on the jury, unless they have a reasonable excuse to the contrary. The jury when assembled are sworn, and charged by the coroner to inquire, on view of the body, how the party came by his death. If the body, either from carelessness or ignorance, should have been interred before his arrival, he must dig it up, because the body must be seen by himself and jury, and which may be done within fourteen days.

The jury being sworn, must hear evidence on oath, whether for defence or inculpation, whether the person was slain, either in any house, field, bed, tavern, or company, as also who were present ; and if any one or more are found culpable, the coroner issues his writ committing the parties to jail, or into the custody of the sheriff. The coroner is also to inquire into the cause of death, when any one is found dead or drowned. Immediately after due inquisition by the coroner and his jury, the bodies whether they died a natural or a violent death, are to be buried.

By act of parliament, every coroner is obliged to certify all cases of murder to the assizes, and put the evidence into writing, and to bind over the witnesses to give evidence at the ensuing jail delivery, otherwise, on neglect, the coroner is liable to a fine at the discretion of the court. The coroner can inquire of accessories *before* the fact, but he is debarred from any inquiry *after* the fact ; that belongs to the court.

It is the duty of the coroner to inquire into the death of every one who dies in prison, which shows the humanity and attention to justice of the laws of England, to act as a check on the brutality or inhumanity of jailers ; for, if a prisoner comes to an untimely death through violence or unreasonable hardship of his keepers, it is counted murder in the jailer, and in consequence of the cruelty, the law implies malice. In the inquest held on prisoners dying under these circumstances, the jury is composed of six prisoners, (if there are as many in the jail at the time,) and six freeholders of the parish in which the prison is situate.

If it is ascertained that a coroner has been corrupt in taking an inquest, the law determines that a *melius inquirendum* shall go to special commissioners, who shall proceed on testimony and not on view, to the entire exclusion of the coroner ; who, in this particular case has nothing to do with the inquest ; but where the inquest has been quashed for informality only, he takes a new inquest, as if none had been taken before.

The power and duties of the coroner seem to have been considerable, for it was his duty to inquire after treasure found, both the finders and the parties suspected, also after all who lived riotously, or that haunted taverns. Besides his judicial place, he had also a ministerial authority as a sheriff, that is, where there is a just exception taken at the sheriff, judicial process is awarded to the coroner, for the due execution of the king's writs,

and in some special cases, the king's original writ is immediately directed to him. It is his duty to be present in the county court, to pronounce judgment of outlawry upon the exigent after *quinto exactus*, at the fifth court, if the defendant does not appear.

Formerly he had a power in certain appeals, which are now disused, as of rape and maiming, and also in cases of abjuration for felony or other offences.

By the statute of 3 Henry VII., the coroner is entitled to a fee on every inquisition, on the view of a body slain, 13s. 4d. to be levied on the goods and chattels of the murderer, if he have any, and if not, his fee is taken from the amercement of the township which suffers the murderer to escape. By the 25 Geo. II., for every inquisition (not taken upon view of a body dying in jail,) he is entitled to 20s. and besides 9d. per mile for every mile he shall be compelled to travel from his usual place of abode, to be paid by order of the justices in sessions, out of the county rates, for which order no fee can be exacted.

But no coroner of the king's household, or of the verge of the king's palaces, nor any coroner of the admiralty, or of the county palatine of Durham, nor of the city of London; and borough of Southwark, nor any franchise belonging to the said city; nor of any city, town, or franchise, not contributing to the county rates, or within which such rates have not been usually assessed, shall be entitled to any benefit by this act; but they shall have such fees and salaries as they were allowed before this act, or shall be allowed by the persons by whom they have been appointed.

A coroner neglecting his duty, is liable to severe punishment. For concealing a felony, or showing partiality to criminals, he shall be imprisoned one year and fined at the king's pleasure, (3 Edward I.) If he is remiss, and neglect to make inquisition on view of the dead body, and to certify the same to the jail delivery, he shall forfeit to the king one hundred shillings. If any coroner, not appointed by an annual election or nomination, or whose office is not annexed to any other office, shall be convicted of extortion in taking more than his lawful fees, or of wilful neglect of his duty, or of any misdemeanor in his office; the court before whom he shall be convicted, may remove him from his office, and if he has been elected by the freeholders, the court shall issue a writ for removing him and electing another in his place. If he has been appointed by the lord of any liberty and franchise, or in any other manner than by the freeholders, the person entitled to the nomination shall, after notice, nominate another person in his place.

The coroner is a judicial officer, and must execute his office in person and not by deputy, and if he acts by deputy, he is liable to the penalties just mentioned.\*

\* Blackstone, Burn's Justice, Lyttleton's Hist. Henry II., Douglas' Peerage, Henry's Hist. of Great Britain.

## MAGNA CHARTA.

THE reign of King John will be for ever memorable in the annals of English history for the melioration of the Constitution, by his concession, however reluctantly granted, of the great charter of British liberties. And as it is the foundation, not only of English freedom, but of the liberties of the whole British dominions, we begin the history of our Constitution with some account of it, and a copy of its translation. In such a miscellany as this, it would be impossible to give a complete commentary on this famous charter, the palladium of British freedom—we shall therefore confine our observations to a brief analysis, pointing out, in as few words as possible, the grievances and hardships that were intended to be removed, with the liberties and privileges that were designed to be granted, by the great charter of King John.

Those privileges and liberties may be divided into four classes:—1. Those granted to the church and clergy; 2. To the earls, barons, knights, and others who held of the king *in capite*, that is, *in chief*; 3. To cities, towns, and merchants, for the encouragement of trade; 4. To the whole body of freemen. None of the parties concerned in this important charter ever entertained a thought of emancipating slaves or villeins, who composed in fact the great mass of the people; and therefore they are only *once* mentioned, and that, not for any advantage for themselves, but entirely for their master's benefit.

The power and wealth of the clergy were then so great, and their grievances so few, that they had scarcely any thing to complain of or to ask; and this probably is the reason why there are so few articles in the charter respecting the church. The famous Constitutions of Clarendon (hereafter related) had been an object of execration and horror to the popes, and the clergy of their party, for more than half a century before the concession of the great charter. After a long and violent struggle, in which Thomas-à-Becket lost his life, Henry II. had been compelled to give up the greater part of these Constitutions; and it is evident, that the articles in the charter respecting the church, were intended to guard against the restoration of these detested laws, and to eradicate their remains, one of which subjected the clergy to the jurisdiction of the civil courts. It is declared in the first article, "that the English church shall be free, and have her rights entire, and her liberties unhurt." By the freedom here stipulated for the church of England, the exemption of the clergy from the jurisdiction of the civil courts, to which they had been subjected by the third Constitution of Clarendon, is most probably here to be understood. Archbishop Becket and the clergy contended as pertinaciously for

this pernicious exemption, as if it had constituted the very essence of christianity, and the very existence of the Church itself: and after they did obtain it, they defended it with equal obstinacy. One of the rights of the church, which is particularly mentioned in the first article, is in direct contradiction to the twelfth Constitution of Clarendon. It is the right, which King John had granted by a particular charter about a year before, to monks of cathedral churches and abbeys, freely to choose their own bishops and abbots.

The twenty-second article of the charter seems very plainly to indicate, that the freedom granted to the clergy implied an exemption of their persons as clergymen, and of their benefices belonging to the church, from civil jurisdiction. For by that article it is declared, that no clergyman shall be amerced according to the value of his ecclesiastical benefice, but according to his secular estate. A clergyman, therefore, who had no secular estate, was not liable to be amerced. One reason for inserting that article seems to have been, that some clergymen, who had secular estates, had been so unreasonable as to plead, that these estates should be exempted from jurisdiction, as well as their ecclesiastical benefices.

None of the Constitutions of Clarendon were more disagreeable to the Pope and clergy than the fourth, which prohibited all bishops and clerks, that is clergymen, from going out of the kingdom without the king's leave. For, by this law, the clergy were prevented from prosecuting their appeals, and other affairs, at the court of Rome, which deprived that court of much solid power and riches. The forty-second article of the charter removed this restraint, and the clergy, as well as others, were permitted to leave the kingdom at their own pleasure.

As the earls and barons were the chief instruments in procuring this charter, there is little doubt but they would be very careful of the interests of their own order. They had suffered considerable hardships under the feudal system of tenures, and to mitigate these some of the articles were framed. The wardship of the heirs of the nobility and chief vassals was a source of great profit to the crown, which exercised great tyranny, in exacting large fines when these came of age, on their taking possession of their estates. The third article corrects this oppressive custom. Sometimes a king of England, at this period, appointed the sheriff of the county, or some other person, to manage the estate of an earl or baron, who was his ward, and to pay the profits arising from it into the Exchequer. At other times he sold or granted the wardship, with all its profits, to some particular person. In both cases, the tenants on the estates of the royal wards were often most grievously oppressed, and their estates wasted, the castles, houses, mills, parks, &c. suffered to go to ruin, because the managers would not be at the expense of repairs. The fourth and fifth articles provided some partial remedies; but the unhappy people who were



annexed to their estates were viewed by these mighty champions of liberty as their cattle or horses, and were sold and transferred in the same way.

But in addition to these grievances, to which the nobility and other military vassals of the crown were subject, they were liable to the exercise of a most intolerable tyranny, from the right which the sovereign possessed of disposing of them in marriage at his own pleasure or caprice. In consequence of this unnatural right, the heirs and heiresses of the greatest families and fortunes were frequently sold or granted in marriage to persons disagreeable to them, or unworthy of them; or, to preserve themselves from such a disagreeable calamity, they were obliged to pay exorbitant fines. The sixth article sets some bounds to this tyrannical privilege of the crown.

But this article was too general and indefinite to be an effectual remedy against so great an evil. Not only heirs and heiresses, but also widows, were subjected to great oppressions by the feudal system, and subjected to the payment of heavy fines to obtain possession of their dower, and for liberty to remain unmarried, or to marry whom they chose. In the thirty-first year of Henry II., Maud, Countess of Warwick, paid the king seven hundred merks, equal in value to seven thousand pounds of our present money, that she might receive her dower, and be at liberty to marry whom she pleased. Lucia, Countess of Chester, paid five hundred merks to King Stephen, that she might not be compelled to marry within five years. King John had carried this part of feudal oppression, as well as all other points of royal prerogative, to a greater extent than any of his royal predecessors; for Alicia, Countess of Warwick, paid him no less a sum than one thousand pounds, that she might not be forced to marry till she pleased.

While the kings of England acted as if they had been the sole judges both of the quantity of the feudal prestations, aids, scutages, and tallages, and of the frequency of exacting them, the property of their vassals was insecure. For when the king could take any proportion of their goods at any time he pleased, they had, in fact, nothing that they could call their own. To prevent this most dangerous abuse in the sovereign, and his granting permission to inferior feudal lords to be guilty of a like abuse over their vassals, is the intention of the twelfth and thirteenth articles of the Great Charter. But because it would be impossible to enumerate all the various tyrannical vexations to which the military vassals of the crown were subject, and to provide particular remedies for each of them, the sixteenth article provides generally, but so vaguely as to have been of very little use, "that no man shall be constrained to do more service for a knight's fee than what is due."

Such were the mitigations of some of the greatest rigours of the feudal system obtained from king John by the barons; but neither party

were capable of forming an idea of the perfect freedom from all the servility of that system which we now enjoy. The act of 12th Charles II. completely revolutionized this system, and secured to us that proud maxim, that "an Englishman's house is his castle."

One thing, which seemed to render these limitations of the sovereign's power as a feudal lord of greater importance and more universal value, was, that by the sixtieth article of this famous charter, the same limitations are imposed on all inferior feudal lords towards their vassals. This reasonable article was probably inserted at the king's desire, which contributed not a little to render the benefit ineffectual. For although the barons were very anxious to prevent any tyrannical exercise of the feudal power of the crown over themselves, they had not the slightest intention to relieve the bulk of the people from any oppression; whether exercised by themselves or by the crown: the people, therefore, are indebted to the king for this attention to their interests. The nobility continued to oppress the people notwithstanding, which encouraged subsequent kings to violate its limitations, and also furnished them with an ever-ready argument in answer to the complaints of the barons.

Trade and commerce, at the period when the great charter was granted, were very little known, and held in the utmost contempt by the proud barons, and the bold yeomanry, of England. For almost half a century after the Conquest, there were no towns of any importance except London and some others, and their inhabitants were little better than slaves to the king or the barons on whose domains they were situated. But about the middle of the twelfth century, they began to emerge from this obscurity, and to obtain some degree of importance. By the royal charters of Henry II., Richard I., and king John, many small towns were made free burghs, with establishments of merchants, guilds, and other fraternities, endowed with various privileges, which quickly filled them with free and independent inhabitants. Many of these free burghs favoured the cause of the barons, particularly the citizens of London, who joined them with so much zeal, that they gave the barons possession of their city. This is perhaps the reason why the privileges of cities and towns, and the interests of commerce, were not entirely overlooked.

Accordingly the thirteenth article grants, that the city of London, and all the other cities, burghs, towns, and ports of the kingdom, should enjoy all their liberties and free customs both by land and water. In the present times, when law and justice have their regular course, such a stipulation would be unnecessary. But at that period this was far from being the case, when fines from cities, towns, and corporations, for license to use their legal rights and liberties, constituted a considerable branch of the royal revenue. It is probable that the citizens of London procured the insertion of the thirty-fifth article, which commanded the London measures of

wine, ale, and corn, with a uniformity of weights, to be observed all over the kingdom. Lending money on interest was then called *usury*, and prohibited to Christians by the canons of the church, and even by the laws of the land. This branch of business was therefore entirely engrossed by the children of Israel, who were the only money-lenders in the kingdom, and very often great extortioners. The citizens of London had borrowed large sums from the Jews; and it is likely that the tenth article was inserted on their suggestion, but which was equally advantageous to feudal superiors who had the wardship of minors.

One of the greatest obstructions to commerce was the irrational jealousy of foreign merchants. In consequence, these merchants were subjected to many restraints and hardships. They were not suffered to enter the kingdom but at certain times, nor to stay above forty days at one time, nor to expose their goods for sale, except at certain fairs. They were frequently obliged to pay large fines to the king for license to trade, and much higher customs and tolls of all kinds than the native merchants. Both their persons and goods were exposed to great violence when a war happened to break out between England and the country to which they belonged. But juster notions began gradually to gain ground, and the forty-first article gives protection to the persons and goods of foreign merchants, both during peace and war.

The great barons who procured this inestimable charter may be viewed as acting in a double capacity: 1. as military vassals of the crown; 2. as subjects generally. They consulted their own interests in the first capacity, by the limitations of the rigours of their feudal tenures, which they procured for themselves, but which was shared also by all who held lands by military services. They consulted their interests in the second capacity, by the amendments they procured in the general police of the kingdom, in which all of their fellow subjects who were freemen were equally partakers. These amendments were both numerous and important, tending to remove or alleviate the several grievances of which the people complained.

The greatest of all the grievances of which the people of England complained at the period of granting the great charter, was—that the mere will and arbitrary commands of the sovereign were substituted in the place of law, and men were seized, imprisoned, stripped of their estates, outlawed, banished, and even executed, without any trial or course of law. Out of many instances that might be adduced of all these tyrannical acts, the case of Thomas-à-Becket, archbishop of Canterbury, may suffice, when Henry II., the greatest and best prince of the age, apprehended all his relations, friends, and dependents, to the number of four hundred persons, men, women, and children—confiscated all their estates and goods, and banished them out of the kingdom, in the middle of winter, anno 1165—and this on account of the archbishop's opposition to the Constitutions of Clarendon, and

his flight out of the kingdom. Henry committed this act of injustice, not only without any trial, but even without any suspicion or possibility of guilt. To put a stop to such outrageous exertions of arbitrary power, the thirty-ninth article was conceded by king John ; which is the most valuable stipulation in the whole charter, and the grand security of the liberties, persons, and properties of the people of England, and of the whole British dominions, which, unless this law is violated, cannot be unjustly invaded. The expressions, “ We will not go upon him—we will not send upon him,” signify that the king would not sit in judgment, or pronounce sentence, on any freeman, either in person or by his judges, except by the verdict of a jury, or by a process conducted according to the established laws of the land. By the laws of the land, may probably be intended trials by ordeals, by judicial combats, and by compurgators, as they were all then in use, and agreeable to law.

Next to the substitution of arbitrary will in the place of law, the king’s personal interfering in lawsuits depending before his courts, in order to interrupt or pervert the regular course of justice, was one of the greatest grievances of that period. This was done in so open and shameless a manner, that the bribes received by the kings for these iniquitous practices were regularly entered in the revenue accounts of every year, and amounted to large sums. To put a stop to this grievous and unjust abuse, king John promises, “ To no man will we sell, to no man will we deny or delay right and justice.”

In the forty-fifth article, king John promised to appoint none to be judges but who had a competent knowledge of law. To remove the inconvenience attending the courts of law being obliged to follow the king’s court from place to place, the seventeenth article was framed. Amercements for trivial offences, or exorbitant and ruinous ones for real delinquencies, were among the greatest grievances of that period. The causes for which amercements were imposed were innumerable ; and their rates were unsettled, and they brought much money into the royal coffers. They were frequently excessive ; so much so, that those who were amerced were said to be *in misericordia regis*, or at the king’s mercy. To set some bounds to these oppressions was the intention of the twentieth, twenty-first, and twenty-second articles, by which it is declared, that earls and barons shall not be amerced except by their peers, and that according to the degree of their delinquency ; and no freeholder or free-man shall be heavily amerced for a slight fault, nor above measure even for a great misdemeanour ; still saving to a freeholder his freehold, to a merchant his merchandise, and to a rustic his implements of husbandry. The savings to these different parties are called their *contenement* ; which signifies such a reservation of their estate and goods, as enabled them to maintain their former rank and consequence, and pursue their ordinary

business. The *contenement* of a soldier was his arms, of a scholar his books; and by the law of Wales, his harp made a part of the *contenement* of a Welsh gentleman.

The prerogative of pre-emption of all things necessary for their court and castles, commonly called purveyance, which belonged to the kings of England at that period, was a source of infinite vexations and injuries to their people. This was sometimes owing to the avarice, and sometimes to the official insolence and cruelty of the purveyors, who attended the court in all its motions. The miseries inflicted on the country by these tyrannical purveyors in the reign of William Rufus are thus pathetically described by Eadmer, who flourished in those times, and beheld the scenes he describes:—"Those who attended the court, plundered and destroyed the whole country through which the king passed, without any control. Some of them were so intoxicated with malice, that when they could not consume all the provisions in the houses which they invaded, they either sold or burnt them. After having washed their horses' feet with the liquors they could not drink, they let them run on the ground, or destroyed them in some other way. But the cruelties they committed on the masters of families, and the indecencies they offered to their wives and daughters, were too shocking to be described." Under better princes, these enormities were no doubt in some degree restrained; but it is not likely that king John's courtiers and purveyors were more modest than those of William Rufus. To remedy these intolerable hardships is the design of the twenty-eighth, thirtieth, and thirty-first articles.

The excessive attachment to hunting and field-sports, indulged in by the sovereigns of the Norman race, was productive of innumerable mischiefs to their subjects. They converted great tracts of country, in almost every county in England, into forests for their game: and these forests, and the game contained in them, were guarded by the most cruel and sanguinary laws. For it was a received doctrine, that the king might make what laws he pleased for the protection of his forests; and that, in making and executing these laws, he was not under any obligation to observe the ordinary rules of justice. In consequence of this doctrine, the forest laws were dictated with such a spirit of cruelty, and executed with such severity, that they were objects of universal terror, and sources of distress to those who were so unhappy as to live near the precincts of any of the royal forests. To mitigate in some degree the cruelty of these laws, and the severity with which they were executed, was the intention of the forty-fourth, forty-seventh, and forty-eighth articles. But these were insufficient to protect the subjects; and therefore, in the ninth year of the following reign, (Henry III.) the barons of England obtained a separate charter, called *Charta de Foresta*, containing more precise and particular regulations.

The barons who procured these concessions from the crown, were not ignorant that king John granted them with extreme reluctance, and with the secret intention to resume some of them at a more convenient season ; and therefore they took every precaution to render the charter effectual, and to secure the rights and liberties which they had obtained. The great seal was not only affixed to it in due form, but both the king and the barons took a solemn oath to observe it in all particulars with good faith, and without dissimulation. To put it out of the king's power to break through his engagements, and to enable the barons effectually to support the charter, all the king's foreign auxiliaries were immediately sent out of the kingdom.

It was not till after a long and bloody struggle, that the people of England obtained the peaceable enjoyment of the rights and liberties contained in the GREAT CHARTER of King John, and in the similar charters of his successors. With much difficulty, by slow degrees, and at a great expense of blood and treasure, was the venerable fabric of the BRITISH CONSTITUTION erected. May the wisdom of our legislators, under the divine blessing and guidance, make such improvements and reformation upon it, as will make it remain for ever the pride and happiness of those who enjoy its blessings, and the envy and admiration of surrounding nations ! \*

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*Translation of the Great Charter of King John, granted June 15th, A. D. 1215, in the seventeenth year of his reign.*

JOHN, by the grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Earl of Anjou,—To all his archbishops, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, commanders, officers, and to all his bailiffs and faithful subjects, *wiseth* health. Know ye, that We, from our regard to God and for the salvation of our own soul, and of the souls of our ancestors and of our heirs, to the honour of God, and of the exaltation of holy church, and amendment of our kingdom, by the advice of our venerable fathers, Stephen archbishop of Canterbury, primate of all England, and cardinal of the holy Roman church ; Henry archbishop of Dublin, William of London, Peter of Winchester, Joceline of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops ; Master Pandulph, the Pope's subdeacon and familiar ; brother Emeric, master of the Knights Templars in England ; and of those noble persons, William Mar-

\* Henry's History of Great Britain.

ischal Earl of Pembroke, William Earl of Salisbury, William Earl of Warren, William Earl of Arundel, Allan of Galloway, Constable of Scotland, Warren Fitzgerald, Peter Fitzherbert, Hubert de Burgh, Steward of Poitou, Hugh de Nevil, Matthew Fitzherbert, Thomas Basset, Allan Basset, Philip de Albany, Robert de Roppel, John Marischal, John Fitzhugh, and of others of our liegemen, have granted to God, and by this our present charter, have confirmed, for us and our heirs for ever :

1. That the English Church shall be free, and shall have her whole rights and liberties unhurt ; and I will this to be observed in such a manner, that it may appear from them that the freedom of elections, which was reputed most necessary to the English church, which we granted, and by our charter confirmed, and obtained the confirmation of it from Pope Innocent III. before the rupture between us and our barons, was of our own free will. Which charter we shall observe, and we will it to be observed with good faith by our heirs for ever. We have also granted to all the freemen of our kingdom, for us and our heirs for ever, all the underwritten liberties, to be enjoyed and held by them and their heirs, of us and our heirs.

2. If any of our earls or barons, or others who hold of us in chief by military service, shall die, and at his death his heir shall be of full age, and shall owe a relief, he shall have his inheritance for the ancient relief, viz. the heir or heirs of an earl, a whole earl's barony, for one hundred pounds ; the heir or heirs of a baron, a whole barony, for one hundred marks ; the heir or heirs of a knight, a whole knight's-fee, for one hundred shillings at most ; and he who owes less, shall give less, according to the ancient custom of fees.

3. But if the heir of any such be under age, and in wardship, when he comes to age he shall have his inheritance without relief and without fine.

4. The warden of an heir, who is under age, shall not take of the lands of the heir, any but reasonable issues and reasonable customs, and reasonable services, and that without destruction, and waste of the men or the goods ; and if we commit the custody of any such lands to a sheriff, or to any other person who is bound to answer to us for the issues of them, and he shall make destruction or waste upon the ward-lands, we will recover damages from him, and the lands shall be submitted to two legal and discreet men of that fee, who shall answer for the issues to us, or to him to whom we have assigned them ; and if we granted or sold to any one, the custody of any such lands, and he shall make destruction or waste, he shall lose the custody ; and it shall be submitted to two legal and discreet men of that fee, who shall answer to us in like manner as was said before.

5. Besides, the warden, as long as he hath the custody of the lands, shall keep in order the houses, parks, warrens, ponds, mills, and other things

belonging to them, out of their issues; and shall deliver to the heir when he is at age, his whole estate, provided with ploughs and other instruments of husbandry, according to what the season requires, and the profits of the lands can reasonably afford.

6. Heirs shall be married without disparagement, and so that before the marriage is contracted, it shall be notified to the relations of the heir by consanguinity.

7. A widow, after the death of her husband, shall immediately, and without difficulty, have her marriage goods and her inheritance; nor shall she give any thing for her dower, or her marriage goods, or her inheritance which her husband and she held on the day of his death; and she may remain in her husband's house forty days after his death, within which time her dower shall be assigned. No widow shall be compelled to marry herself while she chooses to live without a husband, but so that she shall give security that she will not marry herself without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. Neither we nor our bailiffs shall seize any lands or rents for any debt, while the chattels of the debtor are sufficient for the payment of the debt; nor shall the sureties of the debtor be distrained, while the principal debtor is able to pay the debt; and if the principal debtor fail in payment of the debt, not having wherewith to pay, the sureties shall answer for the debt; and if they please they shall have the lands and rents of the debtor until satisfaction be made to them for the debt which they had before paid for him, unless the principal debtor can show that he is discharged from it by the said sureties.

10. If any one hath borrowed any thing from the Jews, more or less, and dies before that debt is paid, the debt shall pay no interest as long as the heir shall be under age, of whomsoever he holds; and if that debt shall fall into our hands, we will not take any thing, except the chattels contained in the bond.

11. And if any one dies indebted to the Jews, his wife shall have her dower, and shall pay nothing of that debt; and if children of the defunct remain who are under age, necessities shall be provided for them, according to the tenement which belonged to the defunct; and out of the surplus the debt shall be paid, saving the rights of the lords of *whom the lands are held*. The same rules shall be observed with respect to debts owing to others than Jews.

12. No scutage or aid shall be imposed, except by the common council of our kingdom, but for redeeming our body, for making our eldest son a knight, and for once marrying our eldest daughter; and for these only a reasonable aid shall be demanded. This extends to the aids of the city



of London, and the city of London shall have all its ancient liberties and its free customs, as well by land as by water.

13. Besides, we will grant, that all other cities and boroughs, and towns, and sea-ports, shall have all their liberties and free customs.

14. And to have a common council of the kingdom to assess and aid, otherwise than in the three foresaid cases, or to assess a scutage, we will cause to be summoned the archbishops, bishops, earls, and greater barons, personally by our letters; and besides, we will cause to be summoned in general, by our sheriffs and bailiffs, all those who hold of us in chief, to a certain day, at the distance of forty days at least, and to a certain place; and in all the letters of summons, we will express the cause of the summons, and the summons being thus made, the business shall go on at the day appointed, according to the advice of those who shall be present, although all who had been summoned have not come.

15. We will not give leave to any one, for the future, to take an aid of his freeman, except for redeeming his own body, making his eldest son a knight, and marrying once his eldest daughter; and that only a reasonable aid.

16. Let none be distrained to do more service for a knight's fee, nor for any free tenement, than what is due from them.

17. Common pleas shall not follow our court, but shall be held in some certain place.

18. Assizes upon the writs of Novel disseisin, Mort d'ancestor (death of the ancestor), and Dernier presentment, (last presentation), shall not be taken but in their proper counties, and in this manner:—We, or our chief justiciary when we are out of the kingdom, shall send two justiciaries into each county, four times a-year, who, with four knights of each county, chosen by the county, shall take the foresaid assizes, at a stated time and place within the county.

19. And if the foresaid assizes cannot be taken on the day of the county court, let as many knights and freeholders, of those who were present at the county court, remain behind, as by them the aforesaid assizes may be taken, according to the greater or less importance of the business.

20. A freeman shall not be amerced for a small offence, but only according to the degree of the offence; for a great delinquency according to the magnitude of the delinquency, saving his contenment; a merchant shall be amerced in the same manner, saving his merchandise, and a villein saving his implements of husbandry. If they fall into our mercy, none of the aforesaid amercements shall be assessed but by the oath of honest men of the vicinage.

21. Earls and barons shall not be amerced but by their peers, and that only according to their delinquency.

22. No clerk (clergyman) shall be amerced for his lay tenement, but according to the manner of others as aforesaid, and not according to the quantity of his ecclesiastical benefice.

23. Neither a town nor a particular person shall be distrained to build bridges or embankments except those who anciently and of right are bound to do it.

24. No sheriff, constable, coroner, or bailiff of ours, shall hold pleas of our crown.

25. All counties, hundreds, wapentakes, and tithings, shall be at the ancient rent without any increment, except our demesne-manors.

26. If any one holding of us a lay fee dies, and the sheriff or our bailiff shall show our letters-patent of our summons for a debt which the defunct owed to us, it shall be lawful for the sheriff or our bailiff to attach and register the chattels of the defunct found on that fee, to the amount of that debt, at the view of lawful men, so that nothing shall be removed from them until our debt is paid to us. The clear overplus shall be left to the executors to fulfil the last will of the defunct and if nothing is owing to us by him, all the chattels shall fall to the defunct, saving to his wife and children their reasonable shares.

27. If any freeman shall die intestate, his chattels shall be distributed by his nearest relations and friends at the view of the church, saving to every one his debts which the defunct owed to him.

28. No constable or bailiff of ours shall take the corn or other goods of any one without instantly paying money for them, unless he can obtain respite from the free will of the seller.

29. No constable (governor of a castle) shall, distrain any knight to give money for castle-guard, if he is willing to perform it himself, for a reasonable cause. Or if he have carried or sent him into the army, he shall be excused from castle-guard, according to the space of time he hath been in the army at our command.

30. No sheriff or bailiff of ours, or any other person, shall take the horses or carts of any freeman, to perform carriages, without the consent of the said freeman.

31. Neither we nor our bailiffs shall take another man's wood, for our castles or other uses, without the consent of him to whom the wood belongs.

32. We will not retain the lands of those who have been convicted of felony above one year and one day, and then they shall be given up to the lord of the fee.

33. All kydeles (weares) for the future shall be quite removed out of the Thames, the Medway, and through all England, except on the sea-coast.

34. The writ, which is *precipe*, for the future shall not be granted to any one concerning any tenement by which a freeman may lose his court.

35. There shall be one measure of wine through all our kingdom, and one measure of ale and one measure of corn, viz. the quarter of London ; and one breadth of dyed cloth and of russets, and of halberjects, viz. two ells within the lists. It shall be the same with weights as with measures.

36. Nothing shall be given or taken for the future for the writ of inquisition of life or limb, but it shall be given *gratis*, and not denied.

37. If any hold of us by fee-farm, or soccage, or burgage, and hold an estate of another by military service, we shall not have the custody of the heir; or of his land, which is of the fee of another, on account of that fee-farm, or soccage, or burgage, unless the fee-farm owes military service. We shall not have the custody of the heir, or of the land of any one, which he holds of another by military service, on account of any petty sergeantry which he holds of us by giving us knives, arrows, or the like.

38. No bailiff for the future shall put any man to his law, upon his own simple affirmation, without credible witnesses produced to that purpose.

39. No freeman shall be seized, or imprisoned, or disseized, or outlawed, or any way destroyed, nor will we go upon him, nor will we send upon him, except by the legal judgment of his peers, or by the law of the land.

40. To none will we sell, to none will we deny, to none will we delay, right or justice.

41. All merchants shall be safe and secure in coming into England, and going out of England, and staying and travelling through England, as well by land as by water, to buy and to sell, without any unjust exactions, according to ancient and right customs, except in time of war, and if they be of a country at war against us. And if such are found in our dominions at the beginning of a war, they shall be apprehended without injury of their bodies or goods, until it be known unto us, or to our chief justiciary, how the merchants of our country are treated in the country at war against us ; and if ours are safe there, the others shall be safe in our country.

42. It shall be lawful for any person for the future to go out of our kingdom, and to return safely and securely, by land and by water, saving his allegiance, except in time of war, for some short space, for the common good of the kingdom, except prisoners, outlaws according to the law of the land, and people of the nation at war against us, and merchants, who shall be treated as is said above.

43. If any one holdeth of any escheat, as of the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands, and shall die, his heir shall not give any other relief, or do any other service to us, than he should have done to the baron, if that barony had been in the hands of the baron ; and we will hold it in the same manner that the baron held it.

44. Men who dwell without the forest shall not come for the future

before our justiciaries of the forest, on a common summons, unless they be parties in a plea, or sureties for some person or persons who are attached for the forest.

45. We will not make men justiciaries, constables, sheriffs, or bailiffs, unless they understand the law of the land, and are well disposed to observe it.

46. All barons who have founded abbeys, of which they have charters of the kings of England, or ancient tenure, shall have the custody of them when they become vacant, as they ought to have.

47. All forests which have been made in our time shall be immediately disforested; and it shall be so done with water-banks, which have been made in our time in defiance.

48. All evil customs of forests and warrens, and of foresters and warreners, sheriffs and their officers, water-banks and their keepers, shall immediately be inquired into by twelve knights of the same county, upon oath, who shall be chosen by the good men of the same county; and within forty days after the inquisition is made, they shall be quite destroyed by them, never to be restored; provided that this be notified to us before it be done, or to our justiciary if we are not in England.

49. We will immediately restore all hostages and charters which have been delivered to us by the English, in security of the peace, and of their faithful service.

50. We will remove from their offices the relations of Gerard de Athyes, that for the future they shall have no office in England; Englard de Cygony, Andrew, Peter, and Gyone de Chaucell, Gyone de Cygony, Geoffrey de Martin and his brothers; Philip Mark and his brothers; and Geoffrey his grandson, and all their followers.

51. And immediately after the conclusion of the peace, we will remove out of the kingdom all foreign knights, cross-bowmen and stipendiary soldiers, who have come with horses and arms to the molestation of the kingdom.

52. If any have been disseized or dispossessed by us, without a legal verdict of their peers, of their lands, castles, liberties or rights, we will immediately restore these things to them; and if a question shall arise on this head, it shall be determined by the verdict of the twenty-five barons, who shall be mentioned below, for the security of the peace. But as to all those things of which any one hath been disseized or dispossessed without a legal verdict of his peers, by King Henry our father, or King Richard our brother, which we have in our hand, or others hold with our warrents, we shall have respite until the common term of the Croisaders, except those concerning which a plea had been moved, or an inquisition taken, by our precept, before our taking the cross. But as soon as we shall return from our expedition, or if by chance we shall not go upon our expedition, we shall immediately do complete justice therein.

53. But we shall have the same respite, and in the same manner, con-

cerning the justice to be done about disforesting or continuing the forests which Henry our father or Richard our brother had made ; and about the wardship of lands which are of the fee of some other person, but the wardship of which we have hitherto had, on account of a fee which some one held of us by military service ; and about abbeys which had been founded in the fee of another, and not in ours, in which abbeys the lord of the fee hath claimed a right. And when we shall have returned, or if we shall stay from our expedition, we shall immediately do complete justice in all these pleas.

54. No man shall be apprehended or imprisoned, on the appeal of a woman, for the death of any other man than her husband.

55. All fines that have been made by us unjustly, or contrary to the law of the land, and all amercements that have been imposed unjustly or contrary to the law of the land, shall be remitted or disposed of by the verdict of the twenty-five barons, of whom mention is made below, for the security of the peace, or by the verdict of the major part of them, together with the aforesaid Stephen Archbishop of Canterbury, if he can be present, and others whom he may think fit to bring with him ; and if he cannot be present, the business shall proceed notwithstanding without him ; but so, that if any one more of the aforesaid twenty-five barons have a similar plea, let them be removed from that particular trial, and others elected and sworn by the residue of the same twenty-five, be substituted in their room, only for that trial.

56. If we have disseized or dispossessed any Welshmen of their lands, liberties, or other things, without a legal verdict of their peers, in England or Wales, they shall be immediately restored to them ; and if any question shall arise about it, then let it be determined in the marches by the verdict of their peers ; if the tenement be in England, according to the law of England ; if the tenement be in Wales, according to the law of Wales ; if the tenement be in the marches, according to the law of the marches. The Welsh shall do the same to us and our subjects.

57. But concerning those things of which any Welshman hath been disseized or dispossessed without a legal verdict of his peers, by king Henry our father or king Richard our brother, which we have in our hand, or others hold with our warranty, we shall have respite until the common term of the Croisaders, except those concerning which a plea had been moved or an inquisition taken, by our precept, before our taking the cross. But as soon as we shall return from our expedition, we shall immediately do complete justice therein, according to the laws of Wales and the parts aforesaid.

58. We will immediately deliver up the son of Lewellyn, and all the hostages of Wales, and charters which have been given to us for security of the peace.

59. We shall do to Alexander king of Scotland, concerning the restoration of his sisters and hostages, and his liberties and rights, according to the form in which we act to our other barons of England, unless it ought to be otherwise by charters which we have from his father William, late king of Scotland, and that by the verdict of his peers in our court.

60. But all these foresaid customs and liberties which we have granted in our kingdom, to be held by our tenants, as far as concerns us, all our clergy and laity shall observe towards their tenants, as far as concerns them.

61. But since we have granted all these things aforesaid, for God, and for the amendment of our kingdom, and for the better extinguishing the discord arisen between us and our barons, being desirous that these things should possess entire and unshaken stability *for ever*, we give and grant to them the security underwritten, viz. That the barons may elect twenty-four barons of the kingdom, whom they please, who shall with their whole power observe and keep, and cause to be observed the peace and liberties which we have granted to them, and have confirmed by this our present charter in this manner: That if we, or our justiciary, or our bailiffs, or any of our officers, shall have injured any one in any thing, or shall have violated any article of the peace or security, and the injury shall have been shewn to four of the aforesaid twenty-five barons, these four shall come to us, or to our justiciary, if we are out of the kingdom, and making known to us the excess committed, require that we cause that excess to be redressed without delay; and if we shall not have redressed the excess, or, if we have been out of the kingdom, and our justiciary shall not have redressed it, within the term of forty days, computing from the time in which it shall have been made known to us, or to our justiciary, if we have been out of the kingdom, the aforesaid four barons shall lay that cause before the residue of the twenty-five barons; and these twenty-five barons, with the community of the whole land, shall distress and harass us by all the ways in which they can, that is to say, by the taking of our castles, lands, and possessions, and by other means in their power, until the excess shall have been redressed, according to their verdict; saving our person, and the persons of our queen and children; and when it hath been redressed, they shall behave to us as they had done before; and whoever of our land pleaseth, may swear that he will obey the commands of the aforesaid twenty-five barons in accomplishing all the things aforesaid, and that with them he will harass us to the utmost of his power; and we publicly and freely give leave to every one to swear, who is willing to swear, and we will never forbid any one to swear; but all those of our land, who of themselves and their own accord, are unwilling to swear to the twenty-five barons to distress and harass us together with them, we will compel them by our command to swear as aforesaid: And if any one

of the twenty-five barons shall die, or remove out of the land, or in any other way shall be prevented from executing the things above said, those who remain of the twenty-five barons shall elect another in his place, according to their pleasure, who shall be sworn in the same manner as the rest. But in all those things which are appointed to be done by these twenty-five barons, if it happen that all the twenty-five barons have been present, and have differed in their opinions about any thing, or if some of them who had been summoned would not or could not be present, that which the major part of those who were present shall have provided and decreed shall be held as firm and valid as if all the twenty-five had agreed to it. And the aforesaid twenty-five shall swear that they will faithfully observe, and to the utmost of their power cause to be observed, all the things mentioned above. And we will obtain nothing from any one, by ourselves or by another, by which any of these *concessions* and liberties may be revoked or diminished. And if any such thing hath been obtained, let it be void and null; and we will never use it, either by ourselves or by another.

62. And if we have fully remitted and pardoned all men, all the ill-will, rancour, and resentments which have arisen between us and our subjects, both clergy and laity, from the commencement of the discord. Besides, we have fully remitted to all the clergy and laity, and, as far as belongs to us, we have fully pardoned all transgressions committed on occasion of the said discord, from Easter, in the sixteenth year of our reign, to the conclusion of the peace. And, moreover, we have caused to be made to them testimonial letters-patent of my Lord Stephen, Archbishop of Canterbury, my Lord Henry, Archbishop of Dublin, and of the foresaid Bishops, and of Mr Pandulf, concerning this security and the aforesaid concessions. Wherefore our will is, and we firmly command, that the Church of England be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and in peace, freely and quietly, fully and entirely, to them and their heirs, in all things and places as aforesaid. An oath hath been taken, as well on our part as on the part of the barons, that all these things mentioned above shall be observed in good faith, and without any evil intention, before the above-named witnesses, and many others.

Given by our hand, in the meadow which is called Runningmede, between Windsor and Staines, this fifteenth day of June, in the seventeenth year of our reign.\*

\* Statutes at Large.

## BILL OF RIGHTS.

BEFORE noticing the absolute rights of individuals, or giving any account of the two Houses of Parliament, we lay before our readers the Bill of Rights, granted by William and Mary at the Revolution in 1688. Magna Charta was forceably obtained from King John, a weak and pusillanimous prince, by the barons of England; but that which consolidated the freedom which we now enjoy, was the voluntary concession of Charles II. in the twelfth year of his reign, but only the first of his actual possession of the crown. By this famous act, (12 Car. II.) he removed for ever the grievous and ignoble yoke of the Norman Conqueror, by enacting that all tenures by homage, escuage, &c. "shall for ever hereafter stand and be discharged," whereby he restored to Englishmen those rights and liberties of which their Saxon ancestors had been deprived by the Norman dynasty, but which they had never ceased to demand as their undoubted birthright.

At the Revolution, the Convention Parliament drew up the Bill of Rights, in which they protest against the prerogative assumed by the late King James, of dispensing with the laws themselves, and also with their execution, as dangerous and unconstitutional; and assert that the things therein demanded "are the true, ancient, and indubitable rights and liberties of the people of this kingdom."

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### *Act declaring the Rights and Liberties of the Subject, and settling the Succession to the Crown.*

WHEREAS the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing *all* the Estates of the people of this realm, did, upon the 13th day of February 1688, present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, &c.

Whereas the late King James II., by the assistance of divers evil counsellors, judges, and ministers, employed by him, did *endeavour* to subvert and extirpate the Protestant religion, and laws and liberties of this realm,—

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws without consent of parliament.



2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the great seal for erecting a court called *The Court of Commissioners for Ecclesiastical Causes*.

4. By levying money for the use of the crown by pretence of prerogative, for other time and in other manner than the same was granted by parliament.

5. By raising and keeping a standing army within the kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law.

7. By violating the freedom of election of members to serve in parliament.

8. By prosecutions in the court of king's bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses.

9. And whereas, of late years, partial, corrupt, and unqualified persons have been returned and served on juries and trials, and particularly divers jurors in trials for high treason which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subject.

11. And excessive fines have been imposed, and illegal and cruel punishments have been inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

And whereas the said late King James II. having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange, whom it hath pleased God to make the glorious instrument of delivering this kingdom from popery and arbitrary power, did (by the advice of the lords spiritual and temporal, and divers principal persons of the commons,) cause letters to be written to the lords spiritual and temporal, being protestants; and other letters to the several counties, cities, universities, boroughs, and cinque-ports, for the choosing of such persons to represent them as were of right to be sent to parliament, to meet and sit at Westminster upon the 22d day of January of this year 1689, in order to such an establishment as that their religion, laws, and liberties might not again

be in danger of being subverted ; upon which letters, elections having been accordingly made :

. And thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do, in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties, declare—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament for longer time, or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning, are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is illegal.

7. That the subjects that are protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That the election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

11. That jurors ought to be duly impaneled and returned ; and jurors which pass upon men in trials for high-treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

I. And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties ; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in anywise to be drawn hereafter into consequence or example.

II. Having entire confidence, &c. The said Lords spiritual and tem-

poral, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them the said prince and princess, during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said prince and princess, during their joint lives; and after their deceases, the said crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said princess, and for default of such issue, to the princess Anne of Denmark, and the heirs of her body, and for default of such issue, to the heirs of the body of the said Prince of Orange. And the lords spiritual and temporal, and commons, do pray the said prince and princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them: and that the said oaths of allegiance and supremacy be abrogated.

“I, A. B. do sincerely promise and swear, that I will be faithful, and bear true allegiance to their majesties King William and Queen Mary. *So help me God.*”

“I, A. B. do swear, that I from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, *that Princes excommunicated or deposed by the Pope, or any authority of the see of Rome, may be deprived or murdered by their subjects, or any other whatsoever.* And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. *So help me God.*”

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms, &c. according to the resolution and desire of the said Lords and Commons contained in the said resolution.

V. And thereupon their Majesties were pleased, that the said Lords spiritual and temporal, and Commons, being the two houses of parliament, should continue to sit, and with their Majesties' royal concurrence, make effectual provision for the settlement of the religion, laws, and liberties of this kingdom, so that the same for the future should not be in danger again of being subverted; to which the said lords spiritual and temporal, and commons, did agree, and proceed to act accordingly.

VI. Now, in pursuance of the premises, the said lords spiritual and temporal, and commons, in parliament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by

authority of parliament, do pray, that it may be declared and enacted, that all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be; and all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their majesties and successors according to the same in all times to come.

VII. And the said lords spiritual and temporal, and commons, seriously considering how it hath pleased Almighty God, in his marvellous providence and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him, from the bottom of their hearts, their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognize, acknowledge, and declare, that King James II. having *abdicated* the government, and their Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, and of right ought to be, by the laws of this realm, our Sovereign Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging; in and to whose princely persons the royal state, crown, and dignity of the said realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested, and incorporated, united, and invested.

VIII. And for preventing all question and divisions in this realm, by reason of any pretended titles to the crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said lords spiritual and temporal, and commons, do beseech their Majesties that it may be enacted, established, and declared, that the crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the survivor of them; and that the entire, perfect, and full exercise of the regal power and government be only in and executed by his Majesty, in the names of both their Majesties, during their joint lives; and after their deceases, the said crown and premises shall be and remain to the heirs of the body of *her* Majesty; and for default of such issue, to her royal highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty. And thereunto the said lords spiritual and temporal, and commons, do in the name of all the people aforesaid, most humbly and faithfully submit them-

selves, their heirs and posterities, for ever ; and do faithfully promise, that they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the crown, herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt any thing to the contrary.

IX. And whereas it has been found by experience, that it is inconsistent with the safety and welfare of this protestant kingdom to be governed by a popish prince, or by any king or queen marrying a Papist, the said lords spiritual and temporal, and commons, do farther pray that it may be enacted, that all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with the see or church of Rome, or shall profess the popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or have, use, or exercise any regal power, authority, or jurisdiction within the same ; and in all and every such case or cases, the people of these realms shall be, and are hereby absolved of their allegiance ; and the said crown and government shall from time to time descend to, and be enjoyed by such person or persons, being Protestants, as should have inherited or enjoyed the same, in case the said person or persons so reconciled, hold communion, or professing, or marrying, as aforesaid, were naturally dead.

X. And that any king and queen of this realm, who at any time hereafter shall come to and succeed in the imperial crown of this kingdom, shall, on the first day of the meeting of the first parliament next after his or her coming to the crown, sitting in his or her throne in the house of peers, in the presence of the lords and commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath, (which shall first happen,) make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles the Second, intituled, *An act for more effectually preserving the king's person and government by disabling Papists from sitting in either house of parliament.* But if it shall happen, that such king or queen, upon his or her succession to the crown of this realm, shall be under the age of twelve years, then every such king or queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or on the first day of the meeting of the first parliament as aforesaid, which shall first happen, after such king or queen shall have attained the said age of twelve years.

XI. All which their majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm for ever ; and the

same are by their said majesties, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled, and by the authority of the same, declared, enacted, and established accordingly.

XII. And be it further declared and enacted, by the authority aforesaid, That from and after this present session of parliament, no dispensation by *non obstante* of, or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill, or bills, to be passed during this present session of parliament.

XIII. Provided, that no charter or grant, or pardon granted before the three and twentieth day of October, in the year of our Lord one thousand six hundred and eighty-nine, shall be any way impeached or invalidated by this act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this act had never been made.\*

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## HABEAS CORPUS.

THE *Habeas Corpus* act has been justly celebrated as the preserver of British liberty. It is so called because it begins with the words *Habeas corpus ad subjiciendum*, but the title of the act in the statute book is, "An Act for better securing the liberty of the subject, and for prevention of imprisonment beyond the seas." This writ being one of high prerogative, must issue from the court of king's bench; its effects extend equally to every county; and by it the king requires the person who holds one of his subjects in custody, to carry him before the judge, with the date of the confinement, and the cause of it, in order to discharge him, according as the judge shall decree. But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a feeble one, or rather was no resource at all against the prince's prerogative, especially under the sway of the Tudors. And even in the first year of Charles I. the judges of the king's bench, who, in consequence of the spirit of the times, and of their holding their places *durante bene placito*, were constantly devoted to the court, declared, "that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council.

\* Statutes at Large.

Those principles and the mode of procedure which resulted from them drew the attention of parliament: and in the bill called the Petition of Right; passed in the third year of the reign of Charles I. it was enacted, that no person should be kept in custody, in consequence of such imprisonment. But the provisions of this act was liable to evasion and abuse: though the judges did not refuse to discharge a man imprisoned without a cause, yet they could use so much delay in the examination of the causes, that thereby the full effect of an open denial of justice could be obtained. To remedy this the legislature again interposed, and in the act passed in the sixteenth year of the reign of Charles I. the same in which the star chamber was suppressed, it was enacted, that, "if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without delay upon any pretence whatever, a writ of *Habeas Corpus* and that the judge shall thereupon, within three court days after the return is made, examine and determine the legality of such imprisonment." This act seemed to prevent the possibility of future evasion: yet it was evaded still; and, by the connivance of the judges the person who detained the prisoner could, without danger, wait for a second, and a third writ, called an *alias* and a *pluries*, before he produced him.

All these different artifices at length gave birth to the famous act of HABEAS CORPUS in the thirty first year of the reign of Charles II. which is considered in England as a second Great Charter and has extinguished all the resources of oppression. Its principle provisions are, 1. To fix the different terms for bringing a prisoner, those terms are proportioned to the distance, and none can in any case exceed twenty days, 2. That the officer and keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority, shall, for the first offence, forfeit one hundred pounds, and for the second two hundred, to the party aggrieved, and be disabled to hold his office, 3. No person, once delivered by *habeas corpus*, shall be re-committed for the same offence, on penalty of five hundred pounds, 4. Every person committed for treason or felony, shall, if he require it, in the first week of the next term, be indicted in that term or session, or else be admitted to bail, unless it should be proved upon oath, that the king's witnesses cannot be produced at that time: and if not indicted and tried in the second term or session, he shall be discharged of his imprisonment for such imputed offence. 5. Any of the twelve judges or the lord chancellor, who shall deny a writ of *habeas corpus*, on sight of the warrant, or on oath that the same is refused, shall severally forfeit to the aggrieved party five hundred pounds, 6. No inhabitant of England (except persons contracting, or convicts praying to be

transported,) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the king's dominions; on pain, that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved, a sum not less than five hundred pounds, to be recovered with treble costs—shall be disabled to bear any office of trust or profit—shall incur the penalties of a *premunire*, and be incapable of the king's pardon. \*

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### TRIAL BY JURY.

THE trial of civil and criminal causes by a jury of twelve men, appears to have been introduced by William the Conqueror, and given by him as an inestimable inheritance to England for all generations, and which is now considered the birthright of every Briton, yet originally it was the spontaneous and free gift of the crown; and as the hearts of kings are in God's keeping, He prompts them to confer benefits on their subjects, which preserves justice and prevents oppression and violence. William was attached to all his Norman customs, and introduced them into England. This custom was not established at first by any positive statute, but came into use by slow degrees, and was far from being common, for almost all causes were tried by the senseless method of ordeals, which were of several sorts. But in the reign of Henry II., a law was made allowing the defendant in criminal or civil processes, to defend his innocence, or his right, either by battle or by a jury of twelve men, called the *grand assize*; the trial by jury, being the most rational, became more and more frequent, till at length it completely eclipsed its barbarous rival the judicial combat, and all other ordeals. The Conqueror without doubt destroyed the freedom and liberty of the English, but by the grant of trials by jury he planted the germ of English freedom, which was fully accomplished by the famous act of the 12 Charles II., from whence may be dated the re-establishment of the church and monarchy, and the restoration of that liberty for which the English nation had struggled ever since the era of the conquest. By the act just named, Charles II. removed all the slavish tenures, the badge of foreign dominion, with all their oppressive appendages, from encumbering the estates of the subjects: and also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property

\* Blackstone, De Lolme,—Statutes at Large.



and persons, form a second *magna charta*, more beneficial and effectual than that conceded by king John at Runnymede.

Trials by jury in civil causes, are of two kinds; ordinary and *extraordinary*.

Jurors returned by the Sheriff are either special or common jurors. *Special* jurors were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases upon motion in court, and a rule granted thereupon, to attend the prothonotary or other proper officer, with his freeholder's book, and the officer is to take, indifferently, forty-eight of the principal freeholders, in the presence of the attorney on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.

A common jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25, which appoints that the sheriff or officer shall not return a separate panel for every cause, as formerly, but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two jurors: and that their names being written on tickets, shall be put into a box or glass, and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused, or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the court; in which case, six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas*, to have the matter in question shown to them by two persons named in the writ, and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors.

As the jurors appear when called, they shall be sworn, unless challenged by either party. Challenges are of two sorts, challenges to the *array*, and to the *polls*.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return, and they may be made upon account of partiality or some default in the sheriff, or his under officer who arrayed the panel. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this is good cause of challenge to the array. The array by the ancient law may also be challenged, if an alien be party to the suit, and upon a rule obtained by his motion to the court for a jury *de medietate linguæ*, such a one be not returned by the sheriff pursuant to the statute 28 Edward III. c. 13, en-

forced by 8 Henry VI. c. 29, which enact that when either party is an alien born, the jury shall be one half denizens, and the other aliens, for the more impartial trial. But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the statute 8 Hen. VI. that when the issue is joined between two aliens (unless the plea be had before the mayor of the staple, and thereby subject to the restrictions of the statute 27 Ed. III.) the jury shall be denizens.

Challenges to the polls, *in capite*, are exceptions to particular jurors. Challenges to the polls of the jury, (who are judges of fact,) are reduced to four heads by Sir E. Coke, *propter honoris respectum*, *propter defectum*, *propter affectum*, and *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be empanelled on a jury, he may be challenged by either party, or he may challenge himself.

2. *Propter defectum*; as if a jurymen be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*. But the principal deficiency is defect of estate, sufficient to qualify him to be a juror. This depends upon a variety of statutes. By the statute 4 and 5 W. and M. c. 24, it was raised to £10 per annum in England, and £6 in Wales, of freehold lands or *copyhold*, which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Ric. III. c. 4, and 9 Hen. VII. c. 13. And lastly, by statute 3 Geo. II. c. 25, any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of £20 *per annum* over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate linguæ*, i. e. one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge to the alien; for as he is incapable of holding any, this would totally defeat the privilege.

Jurors may be challenged, *propter affectum*, for suspicion of bias or partiality. This may be either as a *principal* challenge, or to the *favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree, that he hath been an arbitrator on either side, that there is an action depending between him and the party, that he has taken money for his verdict, that he has formerly been a juror in the same cause, that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Chal-

lenges to the *favour*, or where the party are no principal challenge, but objects only to some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The *triors*, in case the first man called be challenged, are two indifferent persons named by the court: and if they try one man and find him indifferent, he shall be sworn; and then he and two *triors* shall try the next, and when another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest.

4. Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; if he has been branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *premunire*, or forgery.

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by jurors themselves, which are matter of exemption, whereby their service is *excused*, and not *excluded*. As by statute Westm. 2, 13, Edw. I. c. 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 and 8 W. III. c. 32, infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters to physicians and other medical persons, counsel, attornies, officers of the courts, and the like; all of whom if empannelled, must show their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but if they are seized of lands and tenements, they are in strictness liable to be empannelled, in respect of their lay fees, unless they be in the service of the king, or some bishop.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of such men as are summoned upon the first panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff at common law, and must still be done at a trial at bar, if the jurors make default. But at the assizes, or *nisi prius*, by virtue of the statutes 35 Hen. VIII. c. 6, and other subsequent statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus*, of persons present in court, to be joined to the other jurors to try the cause, who are however liable to the same challenges as the principal jurors.

When a sufficient number of persons empannelled or *tales-men* appear,

they are then separately sworn well and truly to try the issue between the parties, and a true verdict to give according to the evidence, and hence they are denominated the jury, *jurata*, and *jurors*, sc. *juratores*.

The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are empannelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question at issue. The opening counsel briefly informs them what has been transacted, in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly, upon what point the issue is joined, which is there sent down to be determined. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and, when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence, and then the party which began is heard by way of reply.

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or spirit in issue, either on the one side or on the other, and no evidence ought to be admitted to any other point.

Again, evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former or *proofs* (to which in common speech the name of evidence is usually confined,) are either written, or *parol*, that is, by word of mouth. Written proofs, or evidence, are, 1, records, and 2, ancient deeds of thirty years' standing, which prove themselves: but 3, modern deeds, and 4, other writings must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very fact of not producing it, is a presumption that it would have detected some falsehood that at present is concealed.

With regard to *parol* evidence, or *witnesses*, it must first be remembered, that there is a process to bring them in by writ of *subpœna ad testificandum*, which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of £100, to be forfeited to the king; to which the statute 5 Eliz. c. 9, has added a penalty of £10 to the party aggrieved and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all, nor, if he appears, is he bound to give evidence till such charges are actually paid him, except he resides within the bills of mortality, and is summoned to give evidence within the same.

All witnesses, of whatever religion or country, that have the use of

their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though the jury from other circumstances will judge of their *credibility*. Infamous persons are such as may be challenged as jurors *propter delictum*; and, therefore, shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event, or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person entrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation, or matters of privacy, as came to his knowledge by virtue of such trust and confidence, but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being entrusted in the cause.

The oath administered to the witness is not only that which he deposes shall be true, but that he shall also depose the whole truth; so that he is not to conceal any part of what he knows, whether interrogated particularly as to the point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he mis-states the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err; and this he is obliged to seal by statute Westm. 2. 13, Edw. I. c. 31, or if he refuses to do so, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues, for the trial at *nisi prius*, but in the next immediate superior court upon a writ of error, after judgment given in the court below. But a *demurrer* to evidence shall be determined by the court, out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may if he pleases demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of all of them in point of law, to maintain or overthrow the issue which draws the question of law from the

cognizance of the jury, to be decided by the court. But neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury after the evidence is summed up, unless the case be very clear, withdraw from the bar to consider of their verdict, and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If the jury eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar, or if they receive any fresh evidence in private, or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will utterly vitiate the verdict.

A verdict (*vere dictum*), is either *privy* or *public*, but the only effectual and legal verdict is the public verdict, in which they openly declare to have found the issue for the plaintiff or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a *special* verdict, which is grounded on the statute, Westm. 2, 13 Edw. I. c. 30. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, whence the issue came to be tried.

Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a *special case*, stated by the counsel on both sides with regard to a matter of law; but the jury may, if they think proper, take upon themselves to determine at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged.\*

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## TREASON.

**TREASON**, according to lord Coke, is derived from *trahir*, signifying to betray; and *trahison*, by contraction treason, is the betraying itself.

When treason is spoken of, it is generally understood to be high treason, unless petit-treason be specially named. Any justice of the peace may, either upon his own knowledge or the complaint of others, cause any person to be apprehended for any such offence. And such justice may take the examination of the person apprehended, and the information of all those who can give any material evidence against him, and put the same in writing; and also bind over such who are able to give any such evidence to the king's bench, or gaol delivery, and certify his proceedings to such court.

No justice of the peace can accept of bail for a person committed for high treason, and he is required immediately to transmit an account of a traitor's examination to the Secretary of State for the Home Department.

Lord Hales calls the statute of 25 Edward III. c. 2, which defines treason, a sacred act; lord Coke calls it an excellent act, and both the king and parliament who made it, *blessed*; which act settled and defined all treasons which before had been uncertain. It was again by 1 Mar. c. 1, reinforced and made the only standard of treason, and all other statutes between 25 Ed. III. and 1 Mar., which made many offences high or petit-treason or misprision of treason, were abrogated; so that no offence is to be esteemed high treason, unless it be declared to be such by the statute of 25 Edward III., or made such by some statute since the 1 Mary.

The statute of 25 Edward III. above alluded to, is as follows:—

“Whereas divers opinions have been before this time, in what case treason shall be laid, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth, that is to say, when a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir, or if a man do violate the king's companion, (that is his wife,) or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir, or

\* Blackstone's Commentaries.

if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere ; and, therefore, be probably attainted of open deed, by the people of their condition. And if a man counterfeit the king's great or privy seal, or his money, and if a man bring false money into the realm, counterfeit to the money of England, knowing the money to be false, and and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine being in their places, doing their offices."

Lord Hale calls the statute of the 1 Mar. sess. 1. c. i., another excellent law, and which he says at one blow laid flat all the numerous treason at any time enacted since Edward III. " No act, deed, or offence, being by act of parliament made treason, by words or writing, ciphering, deeds, or otherwise whatsoever, shall be adjudged to be treason, but only such as be declared by the said statute of the 25 Ed. III."

It is the opinion of lord Coke, that bare words are not a sufficient overt act, or open deed, whereby to convict a person of treason, but that they are only misprision of treason. Lord Hale also says, that words, unless expressed in writing, are not regularly an overt act. But Mr Hawkins argues the contrary, and amongst other reasons for his opinion, he observes, that to charge a man with speaking treason, is unquestionably actionable, which could not be, if no words could amount to treason : also that in case of felony, he who by command or persuasion, induces another to commit felony, is an accessory in felony, so he who does the same in treason, is a principal traitor, (there being no accessories in treason, but all being principals,) and yet such person does not act, but by words. And, accordingly, it has been the constant practice since the Revolution of 1688, when a person by treasonable discourses has manifested a design to murder or depose the king, to convict him on such evidence.

To counterfeit the king's coin is high treason.

Before the passing of the Roman Catholic relief bill, in 1829, there were many offences regarding the usurped jurisdiction of the pope, made treason. By 5 Eliz. any person maintaining the authority of the see of Rome in this realm, incurred a præmunire for the first offence, and for the second the pains and penalties of high treason. Any person practising to absolve or withdraw subjects from their allegiance, as also the parties themselves so absolved or withdrawn, were all declared to be guilty of high treason. By the 13 Eliz. any person procuring or publishing a bull, or instrument from Rome, was guilty of high treason, and any one concealing the same was guilty of misprision of treason.

By 3 James I., persons perverting others, or being perverted to popery, were guilty of high treason. All Jesuits and popish priests coming into



the realm, unless they conformed, were guilty of high treason. These laws and many others are now repealed, and a papist incurs no penalty in the exercise of his religion.

In high treason there are no accessories, all are principals; and, therefore, whatever act or consent will make a man accessory to a felony before the fact, will make him a principal in a case of high treason.

By the 31 Char. II. persons committed for high treason shall be indicted the next term, or next assize, otherwise they shall be held to bail, unless it appear to the court upon oath, that the witnesses for the king could not be produced in that time; in such case, they shall be indicted the second term or assize, or else discharged. But, by the 7 W. and M., no person shall be prosecuted for high treason, but within three years after the offence was committed, except in the case of designing to assassinate the king's person.

Persons impeached of high treason by the house of Commons, whereby corruptions of blood shall be made, shall be admitted to make their full defence by two counsel, who shall be assigned for that purpose, in like manner as upon indictments and other prosecutions. They shall be allowed to make their defence by witnesses on oath. And they shall not be attainted but on the oath of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless they shall confess, or stand mute, or refuse to plead, or peremptorily challenge above 35 of the jury.

The horrible judgment for high treason (except in cases relating to coin,) is, that the traitor shall be carried back to the place from whence he came, and from thence be drawn to the place of execution, and be there hanged by the neck, and cut down alive, his entrails taken out, and burnt before his face, his head cut off, his body divided into four quarters, and his head and quarters disposed of at the king's pleasure. A woman convicted of treason is drawn and burnt.

In the judgment of high treason, the forfeiture of lands and goods to the king is implied, likewise the loss of dower, and the corruption of blood.

Any connexion with the exiled royal family during their lifetime was high treason, but after the extinction of that royal but unfortunate line, no attainder for treason disinherited or prejudiced any heir or other person, other than the offender during his life.

Treason can only be committed against the king; there can be none against the parliament, for the oath of allegiance is to the king alone, as the only supreme governor; he has no partners in the supremacy. If a man offends against either or both houses of parliament, he is not guilty of treason, but of a breach of privilege, and punished accordingly by imprisonment.

**PETIT TREASON.**—This is also defined by the famous statute of 25 Ed.

III., before quoted. "Moreover, there is another manner of treason, when a servant slayeth his master, or a wife her husband ; or when a man, secular or religious, slayeth his prelate, to whom he oweth faith and obedience."

As before named, high treason can only be committed against the king, petit treason is therefore incurred against a subject. But no person can be convicted but on the oath of two credible witnesses, or on confession. (1. Ed. VI.) The judgment for petit treason is, that he shall be drawn to the place of execution, and there hanged by the neck till he be dead ; the judgment against a woman is, that she shall be drawn to the place of execution and there burnt. The consequences of attainder, are forfeiture of lands, (to the lord of the fee,) and of goods, loss of dower, and corruption of blood. Although there cannot be accessories in high treason, yet in petit treason there may be accessories both before and after the fact.

**MISPRISION OF TREASON.**—The word misprision is derived from the French word *mespris*, which properly signifies neglect or contempt ; and therefore, misprision of treason, in legal understanding, signifies, when one knows of any treason, though neither a party in it, nor consenting to it, yet conceals it, and does not reveal it in convenient time. Every man, therefore, that knows of a treason, ought with all speed to reveal it to the king, his privy council, or other magistrate. But it appears that misprision of petit treason is not subject to the judgment of misprision of high treason, but is only punishable by fine and imprisonment, as in the case of misprision of felony.

The judgment of misprision of treason is, to be imprisoned during life, to forfeit all his goods for ever, and the profits of his lands during life. \*

## RIOTS.

THE most luminous statement of the law with regard to riots, was given by lord chief justice Sir Nicholas Tindal, in a charge to the grand jury at Bristol, on 2d January, 1832, at the opening of the commission for the trial of the rioters in that city, and which is here annexed ; as having been delivered solemnly from the judgment-seat, it must be considered as the law of the land.

**GENTLEMEN OF THE GRAND JURY,**—We are assembled on the present occasion, by virtue of the special commission of his majesty, for the purpose of inquiring into, hearing, and determining certain charges of no ordinary stamp and character, founded upon acts of tumultuous outrage,

\* Burns' Justice. vol. i.

violence, and rapine, which have recently taken place in this city. I am unable from any information which has been placed before me, to assign the cause, or to trace the exact origin of these enormities you are now called upon to investigate. It appears, however, that a few hours before they were committed, a tumultuary assemblage of the people gathered itself together, with an object, and for a purpose, which no honest man, or well-wisher of the laws of his country can sufficiently reprobate,—I mean the open and avowed purpose of treating with insult and indignity, if not personal violence, a gentleman placed in a high judicial station, bearing the authority of his sovereign, in the administration of the criminal law within this city, and during part of the very time, engaged in the actual exercise of his judicial functions. It is to be collected from the depositions which I have seen, that the outrages which will form the immediate subject of your inquiry, commenced at about the time of dusk on Saturday evening, the 29th of October last, and continued with short intermission, until four o'clock on the Monday morning, when, after the riot act had been read, and the persons assembled, notwithstanding the proclamation, had refused for more than an hour to disperse themselves, the further progress of the riot was arrested, and the tumult entirely suppressed by the vigour of the military called in to the aid of the civil magistrate. It has been well said, that the use of the law consists, first, in preserving men's persons from death and violence; next, in securing to them the free enjoyment of their property; and although every simple act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuary meetings of the people, in a more especial and particular manner produce this effect; not only removing all security both for the person and property of man, but, for the time, putting down the law itself, and daring to usurp its place. The law of England hath accordingly, in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise; and I think it may not be unsuitable to the present occasion, if I proceed to call your attention, with some degree of detail, to the various provisions of the law for carrying that purpose into effect. In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil

doers to keep the peace. Such was the opinion of all the judges in the time of Queen Elizabeth, in a case called "The Case of Arms," (Popham's Rep. 121)—although the judges add, "that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the king in doing this." It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms, and at all events the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed, than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the common law; and whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the king, as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But when the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the king, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace-officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that undertaking. By an early statute which is still in force, (the 13th Henry IV. c. 7.) "Any two justices,

together with the sheriff, or under-sheriff of the county, shall come with the power of the county, if need be, to arrest any rioters, and shall arrest them ; and they have power to record that which they see done in their presence against the law, by which record the offenders shall be convicted, and may afterwards be brought to punishment." And here I must distinctly observe, that it is not left to the choice or the will of the subject, as some have erroneously supposed, to attend or not, the call of the magistrate as they think proper ; but *every man is bound* when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly. For in the succeeding reign, another statute was passed, which enacts, " That the king's liege people, being sufficient to travel, shall be assistant to the justices, sheriffs, and other officers upon reasonable warning, to ride with them in aid, to resist such riots, routs, and assemblies, on pain of imprisonment, and to make fine and ransom to the king." In the explanation of which statute, Dalton, an early writer of considerable authority, declares that the justices and sheriff may command, and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel. In later times, the course had been for the magistrates on occasions of actual riot and confusion, to call in the aid of such persons as he thinks necessary, and to swear them as special constables ; and in order to prevent any doubt, if doubt could exist, as to his power to command their assistance by way of precaution, a recent statute, 1 Geo. IV. c. 37, has invested him with that power, in direct and express terms, when riot and felony is only likely to take place, or may reasonably be apprehended. Again, that this call of the magistrates is compulsory, and not left to the choice of the party to obey or not, appears from the express enactment in that act—that if he disobeys, unless legally exempted, he is liable to the same fines, penalties, and punishments as persons refusing to take upon them the office of constable, were by law subject to. But the most important provision of the law for the suppression of riots is to be found in the statute 1 Geo. I. sect. 2, c. 5, by which it is enacted, that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices, or by the sheriff, &c., by proclamation to be made in the king's name, and in the form stated in act, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation, unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request, made by proclamation, then such continuing together shall be

adjudged felony, and the offenders shall suffer death as felons. Such are the different provisions of the law of England for the putting down of tumultuary meetings; and it is not too much to affirm, that if the means provided by the law are promptly and judiciously enforced by the magistrate, and honestly seconded by the co-operation of his fellow subjects, very few and rare would be the instances in which tumultuous assemblages of the people would be able to hold defiance to the law. Before I proceed to the consideration of the cases in the calendar, let me impress on the attention of all those who from idleness, curiosity, or mere thoughtlessness, suffer themselves to form part of a riotous or disorderly meeting, that they subject themselves unconsciously to the danger of a punishment for crimes which they never contemplated; for where many are collected together in the prosecution of an illegal object, it is often impossible to discriminate between the active and the unoffending part of the mob; it requires evidence on the part of the accused, which they may not be able to produce, in order to defend themselves against the charge of participation in the guilt of others. The only safe course for the peaceable and well-disposed on all occasions of popular tumult is this—to lend their ready aid to assist the magistrates in suppressing it, or at all events forthwith to separate themselves from the others. One class of cases likely to come before you will be founded upon the statute 7 and 8 Geo. IV. c. 30, s. 8, by which it is enacted, that “if any person riotously and tumultuously assemble together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, &c., every such offender is guilty of felony, and being convicted thereof, shall suffer death as a felon.” In cases of this description, you will consider whether the individual charged was one of the persons constituting a riotous assemblage which was effecting the destruction of the building. If he formed a part of such riotous assembly at the time the act of demolition began, or if he joined such riotous assembly, so as to co-operate with them whilst the act of demolition was going on, and before it was completed, in either case he comes within the description of the offence, and within the penalties imposed by the act, although he may not have been a person who actually assisted by his own hand in the demolition of the building. But the more numerous class of cases seems to be, that which is founded on the second section of the same statute, by which it is enacted, “that if any person shall unlawfully and maliciously set fire to any house or other building mentioned above, whether the same shall be in possession of the offender, or in that of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.” In this offence, you will perceive it is no constituent part of the description in the statute,

that the party charged should form one of a tumultuous or riotous assemblage for the disturbance of the public peace: it is an offence that may be committed by a single individual. If by his word or gesture he incited others to commit the felony; or if he was so near to the spot at the time that he by his presence wilfully aided and assisted them in the perpetration of the crime, in either of these cases the felony is complete, without any actual manual share in its commission; and where the statute directs that, to complete the offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does what is illegal, and which, in its necessary consequence, must injure his neighbour; and it is necessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him. Nor will it be necessary to prove that the house which forms the subject of the indictment, in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended. Another class of offenders will be that of persons who stand charged with acts of plunder and theft; and these may come before you, either aggravated by the circumstance of violence, or threats to the person of the owner, or with the circumstance of a breaking into his dwelling-house, or stealing the property thereout when the house was already broken open. In both which cases the offence is considered of a more aggravated nature, and the measure of punishment is consequently more severe; and the facts may assume the shape of a simple larceny of the goods of another. In all of which cases, as in the case of arson before adverted to, all who are present, assenting to, and co-operating in the act, are, in point of law, principal offenders. The only other observation I would suggest is this,—that where property which has been stolen is found in the possession of any person recently after the theft is committed, unless circumstances appear to rebut such presumption, he may be presumed guilty of the theft, until he can explain or prove his innocent possession of the property. Upon the subject of a very numerous class of cases relating to the receiving of stolen property, with the guilty knowledge that it has been stolen, I hold it to be unnecessary to offer you any observation whatever. There is, however, one case which stands in a different situation from the rest, and to which it may be proper that I should call your particular attention. I mean the case of one Lewis, who was at large upon his recognisance, but who has surrendered since, and who stands charged upon an inquest before

the coroner, with the offence of manslaughter, in shooting a boy of the name of Morris. It appears from the depositions before the coroner, that Lewis was acting in aid of the civil authorities, in assisting to clear the streets, after proclamation had been regularly made, requiring the rioters to disperse themselves, and after they had continued together for more than an hour from the time of making the proclamation. It appears also, by the testimony of the witnesses, that the pistol was not aimed at the boy who was unfortunately struck by the ball. The nature, however, of the offence committed by Lewis will not depend so much upon that fact, as upon the circumstances under which the pistol was originally discharged. If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter; but if it was discharged in the fair and honest execution of his duty, in endeavouring to disperse the mob, by reason of their resisting, the act of firing the pistol was then an act justified by the occasion, under the riot act before referred to, and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter.—Mr Lewis was acquitted.

**SUPPRESSION OF RIOTS BY MILITARY INTERFERENCE.**—It is said, that “in the year 1780, the law respecting the suppression of riots was so little understood, that a great deal of mischief was effected, which might otherwise have been prevented,”\* and “that in the absence of magistrates, even soldiers stood inactive, with arms in their hands, while the greatest atrocities were committed before them.” Since that period there have been many occasions on which it has been indispensably necessary to bring this law into force, and to explain its provisions; particularly at the trials of the Bristol rioters, when it was expounded at considerable length by the present Chief Justice of the Common Pleas. His lordship took that opportunity of commenting upon the duties imposed by this law upon soldiers. The surprise which was expressed in different parts of the country at the doctrine which he laid down, proved the existence of a general misapprehension upon the subject; and we are led to suspect, from the language which at that time was commonly used, that the grounds upon which the interference of a military force is accounted legal, and the duties to be performed and the liabilities to be incurred by soldiers, still stand in need of explanation. (See preceding article.)

There exists, however, so close a resemblance between the duties of a soldier and those of a private citizen in times of disturbance, that in order to make the one class of duties intelligible, we are obliged to give an explanation of the other. We shall proceed, then, to quote the law by which the conduct of private citizens and civil magistrates is to be regulated, and

\* *Handcock v. Baker*, 2 B. and P. 264.



we will afterwards pass to the peculiar object of our discussion—the duty of a soldier.

By the common law,\* “any private person may lawfully endeavour to suppress a riot, by staying those whom he shall see engaged therein from executing their purpose; and also by stopping others whom he shall see coming to join them:” and “private persons may even arm themselves in order to suppress a riot; from whence it seems clearly to follow, that they may also make use of arms in the suppressing of it, if there be a necessity for so doing.” It should, however, be observed, that where this law is laid down, a caution is added, as to the propriety of carrying it into execution, viz., “that it seems hazardous for private persons to go so far in common cases, and that such violent methods seem only proper against such riots as savour of rebellion.”† The statute law, applicable to the duties of the private citizen, invariably couples them with the duties of the magistrate, or of some other peace officer; but it must be remembered, that the duties and powers of a private citizen at common law, have never been curtailed by statute and remain unaltered; while other duties, accompanied with certain formalities, have been imposed almost indiscriminately, and certainly without any reference to the distinct military or civil character, upon the whole body of the people.‡ This principle pervades the statute of Edward III.,§ and that of George I.,|| and all the other important statutes connected with the subject: no old duties are abolished; but to those which already existed, new and different duties are superadded.

The power of a justice of the peace to restrain rioters existed under the common law. By statutes of Edw. III. and Rich. II., he was empowered to arrest and chastise them, and to inflict upon them different punishments, according to his discretion. If two justices are present, they are empowered by 13 Hen. IV. c. 7, s. 1, “to come with the power of the county, if need there be, for the purpose of suppressing disturbance;” and by 2 Hen. V. c. 8, s. 2, “the king’s liege people, being sufficient to travel, shall be assistants to them, upon reasonable warning, to side with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment, and to make fine and ransom to the king.” But the statute under which justices generally act, in their endeavours to quell disturbances, is, the 1 Geo. I. c. 5., commonly called the Riot Act. One justice, or more

\* See Popham, 121; Kel. 76; Chit. Burns’ Just. 5, 280.

† The full extent of the legal powers of a private citizen in this respect is thus explained by Lord Hale:—“If the felon resists or flies, so that he cannot be taken without killing him, this is justifiable and no felony; but still it must be, where he cannot be otherwise taken, for it is for advancement of justice and suppression of felons, and therefore, if they cannot be otherwise apprehended, it is lawful, as well as if it were a constable and had a warrant.”—*Pleas of the Crown*, vol. ii. p. 77.

‡ The persons who are not bound by the 2 Hen. V. c. 8, s. 2, to assist magistrates in the suppression of riots, are women, clergymen, persons decrepit, and infants under the age of fifteen.

§ 34 Edw., III., c. 1.

|| 1 Geo. I. c. 5.

than one, is, by this statute, enjoined to repair to the scene of disturbance, and to read the king's proclamation, ordering all persons to depart peaceably to their habitations. To remain tumultuously assembled, for more than one hour after the reading of this proclamation, is made felony: the magistrate and peace officer are empowered to apprehend the offenders, and to command all his majesty's subjects of age and ability to be assisting to them therein; and, by a special provision, the magistrates and their assistants are indemnified, in case any of the offenders are maimed or killed in the struggle.

From the consideration of the common law, and of these several statutes, the duties of a private citizen may be easily collected. If no magistrates or peace officers are present, he must make his best exertions by peaceable means to check a riot, and in case any felony is attempted, he is justified in having recourse to arms. If any magistrates are present, he should put himself under their direction, and co-operate with them for the re-establishment of order. Even if they choose to adopt the formalities prescribed by a particular statute, the duties imposed and powers conferred by the common law, still remain in force and ought to be immediately executed, if any fit emergency arise. To give a familiar instance,—the Riot Act makes it felony to remain tumultuously assembled for more than one hour after the proclamation has been read; and so far as respects the provisions of the Riot Act, persons so remaining might, in the intermediate hour, be guilty of every species of mischief. The apparent defect is corrected by the provisions of the other statutes, and of the common law, according to which, as we have clearly seen, private persons as well as magistrates have full legal powers for interfering with effect.

With respect to the suppression of riots, the situation of a soldier and that of a private citizen are precisely the same. "Whatever any other class of his majesty's subjects may do, the military may unquestionably do also."\* Lord Chief Justice Tindal laid down the same law in the trial of the Bristol rioters, which we have already quoted; and in the *King v. Pinny*, the attorney-general quoted the authorities of lords Mansfield and Thurlow to the same effect. We may add, that there is in civil law (we use the term as contradistinguished from military law) no distinction between the officer and the private soldier. They all appear in the same character of citizens, when called out to suppress riot. If the private citizen is bound to stay the riot by gentle means, so are the soldier and officer; if the private citizen is bound to obey the magistrate or peace officer, to use violent means in preventing a felony, and even to hazard the destruction of life in his exertions to maintain peace: upon the officer and soldier the same duties are incumbent in the same form and in the same degree.

\* See the opinion of the late Lord Ellenborough, printed amongst the "General Orders issued to the army by the commander-in-chief, 1801."

So far then all is plain, that the soldier is not placed in a more difficult situation than the private citizen. But the soldier is bound by another law, peculiarly applied to himself, namely, the military law, or that which is contained in the Mutiny Act ; and before we can clearly understand the position in which he stands, we must examine the provisions contained in this act for occasions of this nature.

Respecting our military law there prevails a great deal of error. It has often been mentioned as a law at variance with all the rest of our law ; a law separate and distinct in itself, and dangerous to the public liberties ; whereas it is in reality a part of the general law, consistent with other laws and recognising their existence, and by no means interfering with the general rights and liberties of the subject. Like every other law which applies directly to a peculiar class, it is partial in its operation ; and it certainly restricts the privileges of that class of persons for the government of whom it is enacted. But to the general liberties of the subject it is peculiarly favourable, as it serves to restrain a body that might overpower the civil force and establish tyranny over the country ; “for nothing is so dangerous to the civil establishment of a state, as a licentious and undisciplined army.”\* Lord Loughborough’s observations upon the true nature of our military law, and its difference in character and effect from the law which generally bears that name, are so clear and so much to the point, that we are tempted to offer them at some length to the consideration of our readers. “This leads me to an observation that martial law, such as it is described by Hale, and such also as it is marked by Mr Justice Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called ‘martial law,’ merely because the decision is by a court martial, but which bears no affinity to that which was attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons under all circumstances ; even their debts are subject to inquiry by a military authority ; every species of offence committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as within the cognizance of military authority.” Again : “The army being established by the authority of the legislature, it is an indispensable requisite of that establishment that

\* 2 H. Blackstone, 68.

there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. This has induced the absolute necessity of a Mutiny Act accompanying the army.”\*

The military law, then, which prevails in this country is narrowly confined in its operation, affects none but persons receiving military pay, and affects even them only in respect of military offences. The line of distinction between the two classes of cases which fall between the civil and military jurisdictions has been established by the civil courts with a just jealousy of military interference,† so that even an inferior officer may bring an action against his superior if the limits of military authority are transgressed. Besides, one of the first provisions of the Mutiny Act is, that “nothing in this act‡ contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law;” and there is an additional precaution which prevents the act from endangering public liberties, namely, that its existence terminates with each successive year.

Such being the nature of our military law, its provisions must always be construed in accordance with the other portions of that general law, of which it is a part. The only clause of the Mutiny Act which can be made applicable to the suppression of riots is that in which the soldier is required on pain of death “to obey the *legal commands* of his officer.” Our construction of these words may sound harshly in the ear of an advocate for rigid military discipline and the paramount superiority of officer over soldier; nevertheless, it is the true legal doctrine, that in every case the duty of obedience on the part of the soldier depends upon the legality or illegality of the command; and the soldier who does an illegal act in obedience to the command of his officer, cannot bring forward the command as a sufficient legal defence in a civil court of justice.

An objector to this doctrine will probably ask, whether the obedience of a soldier is in every case to depend upon his own judgment, whether he is to exercise his own discretion, and, in case he entertain doubts upon the legality of the orders, to set up his own opinion in defiance of his officer? Such is certainly his duty according to the laws which now prevail; nor is it in practice accompanied with so many difficulties as might perhaps have been anticipated. In time of war, almost all measures, however violent, may be legally commanded, if they are directed against an enemy; in time of peace, the routine of daily discipline is clear and simple, and leaves no room for hesitation as to the legality of the officer’s commands. Amongst the few occasions on which doubts can arise, is this case of the suppression

\* 2 H. Blackstone, 99.

† See *Warden v. Bailey*, 4 Taun., 67.

‡ See 2 Geo. IV., c. 23, s. 2.

of riot. Yet even in this case the responsibility of the soldier, so far as respects the civil courts, is no greater than the responsibility of a private citizen. A private citizen, carrying deadly weapons, would not be justified in using them, because a magistrate ordered him to do so, unless the circumstances were of so aggravated a character as to justify the magistrate in giving the order ;—while, on the other hand, he might be punished for neglecting to use them, if the magistrate was justified in giving the order, and he refused to obey it. Thus must he, as well as the soldier, decide upon the question of legality.

Suppose the military law were differently framed, and the word *legal* omitted, and the soldier were obliged to obey every command of his officer. An instance might then occur in which an officer, either through ignorance or barbarity, might give orders to fire upon a multitude, whose conduct did not justify the attack ; hundreds might be butchered within a few minutes, and the whole evil be attributable to the error of a single individual. A soldier would always be justified in shedding blood, provided his commander gave the command ; and the person in authority would be a giant of a hundred hands for the execution of evil. Such principles are abhorrent, not merely from the condition of free citizens, but also from the laws of humanity. Soldiers would become the objects of general apprehension, for every man would remember, that in all institutions, however well regulated and however much approved by experience, some members will always be found destitute of principle, or wholly incapable of regulating their passions, who, to gratify their feelings of revenge, or in perfect recklessness of the miseries they are producing, may employ their formidable strength in oppressing or destroying their fellow-subjects. Such a case is an extreme case, and highly improbable, and is suggested merely to show the tendency of such an alteration of the law. If the soldier is to be justified in obeying every command of his officer, the justification will include the worst as well as the best command ; but if any line is to be drawn where the duty of obedience shall terminate and that of disobedience begin, we are at a loss to discover a line less inconvenient to all parties than that which is drawn upon the principle of legality.

The difference between the soldier and private citizen, when engaged in repressing disturbance, does not lie in the necessity of considering the legality of the orders which are received, but in the liability of a soldier to be summoned before a military tribunal. He is ordered to fire. If he obeys, will the jury consider the command legal ? If he disobeys, will the court martial decide it to be illegal ? It is the fear of this second tribunal, which, while it is unknown to the private citizen, forms the principal embarrassment to the soldier. Not that the courts martial are guided by a law which is at variance with the law admitted in all our criminal courts ;

for we \* hope that we have given sufficient proofs that the military and civil laws are in harmony with one another, and that the command which would be declared illegal in the King's Bench, ought to meet with no approbation before a military tribunal: still we know that in the decision of such questions men are strongly influenced by their habits and general opinions; and that a scene which one man would ridicule as a temporary and unimportant ebullition of popular feeling, would by another, accustomed to the quiet regularity and sober discipline of well-organized troops, be treated as a violent commotion, dangerous to the existence of government, and to be repressed at all hazards, whether of life or property. Thus might the soldier be condemned before the court of his regiment, although his only crime was a refusal to obey his officer and fire upon a mob, when that act would have rendered him, in the eyes of a common jury, liable to a conviction for murder.

It frequently happens, that, on occasions of this nature, the minds of the jury are unjustly adverse to the soldier. No sooner has a person in the mob been killed by a soldier, than the enemies of order seize upon the event as a means of irritating the public mind, fill the newspapers with the grossest misrepresentations, conceal the violence of the mob and the danger of the soldiers, and poison the mind of the jurymen before he enters upon the trial. At the funeral of the late Queen there was a determined and pre-arranged attempt to resist the commands of government, to drive back the military, and to prevent the procession from taking place. The soldiers were loaded with every abuse, attacked with stones and brickbats, and rendered incapable of performing the duties of an escort, or even of protecting their own lives without repelling force by force; thirty-five were so dangerously wounded as to be taken immediately to the hospital: yet when an inquest was held upon the bodies of the rioters who were killed, one verdict was returned of "manslaughter," and the other of "murder," apparently to the great gratification of a large portion of the community.

The riots of which we have hitherto treated, have amounted either to felonies or misdemeanors. The third species of riot, which amounts to treason, forms a less important subject of consideration than it would have formed two centuries ago; because many offences which were formerly treasons, have been declared by law to be so no longer, and of those which

\* The following is a portion of the oath which is taken by the members of the court martial. "I, A. B., do swear that I will duly administer justice according to the rules and articles for the better government of his Majesty's forces, and according to an Act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise, which is not explained by the said articles or act, then according to my conscience, the best of my understanding, and the custom of war in like cases."

are still treasonable, a large proportion are now prosecuted under another character.

The statute 25 Edward IV. contains those definitions of treason which are authorities at the present day. The words of that statute within the meaning of which a riot may be brought are the following:—"If a man do levy war against our lord the king in his realm;" or "When a man doth compass or imagine the death of our lord the king, or our lady his queen, or of their eldest son and heir." The constructive treasons which were founded upon these words, during the more arbitrary periods of our history, were so numerous, that if they had retained the sanction of the law, they would have included a large proportion of the riots which have occurred during the present century. The law was happily altered in this particular by the 1st Mary, statute 12, which enacted, "That no act, deed, or offence being by act of parliament made treason, petit treason, or misprision of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason in or by the act of parliament of 25th Edward III., touching treason or the declaration of treason, and none other, nor that any pains of death, penalties or forfeitures in any wise ensue, or be to any offender or offenders, for doing or committing any treason, petit treason, or misprision of treason, other than such as be in the said act ordained and provided, any statute made before or after the said 25th year of Edward the III., or any declaration or matter to the contrary notwithstanding." By this act, then, treasons have been reduced to the old standard of 25 Edward III.: yet even this class of offences is still so comprehensive as to include a large number of cases which are in these days treated as common felonies.

To show the treasonable character attaching to many of those riots which have recently taken place, we may quote the following case which occurred in 1675. "A great number of weavers in and about London, being offended at the engine loom, (which are instruments that have been used these sixty years,) because thereby one man can do as much in a day as nearly twenty men without them, and by consequence can afford his ribbands at a much cheaper rate; after attempts in Parliament and elsewhere to suppress them, did agree among themselves to rise and go from house to house to take and destroy the engine looms; in pursuance of which they did, on the 9th, 10th, and 11th of this instant August, assemble themselves in great numbers, at some places to a hundred, at others to four hundred, and at others, particularly at Stratford-Bow, to about fifteen hundred. They did in a most violent manner break open the houses of many of the king's subjects, in which such engine looms were, or were by them suspected to be; they took away the engines, and

making great fires, burnt the same, and not only the looms, but in many places the ribbands made thereby, and several other goods of the persons whose houses they broke open; this they did, not in one place only, but in several places and counties—Middlesex, London, Essex, Kent, and Surrey, in the last of which, viz. at Southwark, they stormed the house of one Thomas Bybby, and though they were resisted, and one of them killed and another wounded, yet at last they forced their way in, took away his looms and burnt them; the value of the damage they did is computed at several thousand pounds.\* We might almost fancy that, in quoting this history, we were writing an account of those formidable riots which occurred in the year 1830; and we feel convinced that not merely the rioters of that year, but also the public at large, would have been surprised to learn that the offence bordered upon high treason, and that a case so precisely similar had been declared treason by five of our judges.† The criminal acts drawn up under Sir Robert Peel's superintendence declare offences of this kind, and many others, which would have formerly been punished as treasons, to be felonies; but they do not abrogate the law previously existing upon treasons; they are cumulative, and leave it to the discretion of the public prosecutor whether he shall not indict the offenders upon a charge of high treason. One of the prisoners at the Bristol trials endeavoured to turn the existence of the ancient law to his advantage. Being indicted for the commission of a felony in attacking the public prison, he attempted to put in as a plea that the offence was treason and to be punished as such, because he had openly declared during the attack that he would destroy *all the prisons* in the land. The judges overruled the objection, not however denying his offence to be treasonable, but asserting, that although it was treason, it might be still a felony, and prosecuted as such under the provisions of Sir R. Peel's act.‡

Among the riots, then, which a soldier may be called upon to suppress, some may be misdemeanors, some felonious, others may be felonious and treasonable, and others may distinctly amount to high treason, and ought

\* Hale's Pleas of the Crown, vol. i. p. 142.

† *Morning Chronicle*, January 5th.—“Mr Palmer, on behalf of Clarke, took an objection to the indictment, contending that the evidence went to show that he had declared he would set fire to all the goals in the kingdom, and that he was thereby guilty of high treason, in which the felony was merged. The learned counsel, therefore, submitted that the prisoner must be acquitted. The learned judges, (Tindal, Taunton, and Alderson,) however, in delivering judgment, said that the objection was not tenable. They had yet to learn that if a person who might be charged with high treason had done an act amounting to murder, arson, or other offences which might be made acts of that treason, that therefore, he was to be acquitted as such, and the crown driven to prefer an indictment for high treason; but in this case, the declarations of the prisoner were so far from the time of the acts committed, when it did not appear that he was in company of those who had been concerned with him in committing the acts themselves, that it could not be said that he was guilty of high treason.”



to be treated as such. The duty incumbent upon a private person for the suppression of treason is not treated in any of our law-books distinctly from the duty of suppressing felony. Lord Hale and Serjeant Hawkins\* treat of both together; and having commenced the discussion upon the arrests of "traitors and felons," subsequently employ only the term of "felons." Indeed,† "in ancient time, every treason was comprehended in the name of felony;" and lord Hale talks of "treasons and other felonies;" so that in every case of treason, a private person may safely act as in a case of aggravated felony. In many instances, the nature of the act, such as an attack upon the king's person, or upon his courts of justice, or his fortresses or troops, will leave no doubt upon the mind of any man as to the course to be pursued; and it may be observed generally, that the aggravation of the offence will prove to him at once, that, for the purpose of checking it, the use of the most violent means will be perfectly justifiable. The same principle of law which applies to a soldier in respect of felony, will also apply to him in respect of treason. In the eye of the civil law, he acts as a private person, bound by the same duties, and subject to the same responsibility. In respect of military law, he is still bound to obey the *legal commands* of his officer. If no officer is present, every interference to suppress treason is legal; if an officer is present, every command issued for that purpose will be legal; if a magistrate is present, every command issued by him should be obeyed by the officer and transmitted to the soldier, and both one and the other are equally bound to obey it.

Such is the state of the law under which is to be decided, on each successive riot that occurs, the policy of having recourse to military aid. The magistrate must remember that the responsibility for consequences is not confined to himself alone; that an improper order, on his part, may subject to capital proceedings, not merely himself, but also those persons, whether civil or military, who act under his directions; that while private individuals are to consider only their duties as private citizens, the soldier is bound by military as well as civil law; and that however harmonious the one law may be with the other, there may be moments of difficulty, in which the soldier may find himself at a loss between the several obligations which they create. Perhaps the soldier may feel sure that the occasion does not justify the use of fire-arms, even after the order to fire has been given; or, on the other hand, he may consider his own life, or that of others about him, in such jeopardy as to require an immediate attack upon the mob, although he has received orders to remain inactive. In either

\* Hale's Pleas of the Crown, vol. ii. p. 72. Hawkins' Pleas of the Crown, vol. ii. p. 114.

† Co. 3, Inst. 15.

case, he may be uncertain whether his own discretion, or the commands of his officer should be obeyed ; whether he should hazard the decision of a civil, or that of a military court : and unless his services are indispensable to the maintenance of public peace, he ought not to be exposed by the magistrate to these painful and difficult alternatives.

At the same time, when matters come to extremities when the civil power is unable to enforce the law, there is no body in this country so effective for the end in view as the regular army. In many instances, soldiers of the militias are personally acquainted with persons in the mob ; they and their officers, as well as the yeomen and their officers, often have as individuals a pecuniary or some other interest in the suppression of disorder. Thus they will be considered as taking part for their own private advantage, and not for the mere promotion of peace. The subjects on which riots have generally occurred,—the amount of wages, the price of food, or the support of peculiar political opinions, are such as frequently separate the farmer from the labourer, the richer from the poorer classes, the yeoman from the multitude against which he is required to act. The consequence is, that the yeomen is suspected of taking arms, not for the mere purpose of suppressing riot and protecting himself and his property, as well as his fellow subjects and their property, from the violence of intemperate men, but in order to promote his own political views, to resist claims which the multitude believe to be just, and to settle civil controversies by an appeal to the sword. Can such a motive, widely circulated by some mischievous and artful ringleader, fail to raise a general unwillingness to concede ? or to excite amongst the rioters a resolution to imitate the bad example which they fancy that they perceive in the conduct of the executive power—i. e. to vindicate by a similar recourse to arms, the opinions and claims which they are assembled to promote ? We might say much of the evil consequences which are felt after peace has been re-established, of the discordance between the several ranks of society, of the heart-burnings and anger and indignation with which the peasantry regard the farmer, and the artisans their master manufacturer, while they harbour the sorrowful recollection of some friend or associate who fell a victim in the struggle, and cherish a determination to take the first opportunity of vengeance. From these and many other drawbacks, which attach to the militia and yeomanry, the regular soldier is wholly exempt. Very probably he marches into the neighbourhood of the scene of action but a few days before the event occurs, and he leaves it immediately afterwards. He has no friends amongst the multitude, no interest in the circumstances out of which the disorder arises—he is the mere agent of the law, and cannot be suspected of any other desire or intention than to perform his duty as a soldier, and in obedience to the commands which he receives to overcome the enemies of order. His interference is humane, because the multi-

tude know the impossibility of resistance, and retire from the struggle : it is effective, because his discipline, confidence in his comrades, and acquaintance with the use of arms, insure to him an easy victory. Thus it generally happens that life is saved, while the law is enforced.

It is obviously desirable that the people should learn to regard the executors of the law as altogether distinct from the law itself, to consider their actions as altogether mechanical and independent of the merits or demerits of the law, and in times of riot to regard them as solely endeavouring to re-establish order, without any reference to the cause from which the disturbance arose. How this notion can gain ground, if yeomanry, or militia, or any persons principally interested in the causes of disturbance, are themselves to repress it, we are at a loss to conceive.

The superiority of the regular army over yeomanry and militia for the suppression of riot, has been long experienced in Ireland. In that country party spirit is inflamed to the highest pitch, and its bitter fruits are too plainly perceived in the distrust and personal hostility which divide all ranks of society. The yeomanry are accused (whether justly or unjustly is little to our present purpose) of partiality, violent party feelings, and an opposition to the religion of the vast bulk of the people. They constantly encounter a vigorous resistance, and their conduct is invariably misrepresented. On the other hand, the soldiers, although performing the same duties and enforcing the same laws, are generally respected, are even popular, are seldom obliged to draw the sword, but compel the restoration of order by the mere apprehension of their force.

Having explained the law as to the employment of soldiers in maintaining the public peace, we cannot help touching upon the idle complaints which have been not unfrequently made, that such an employment of them is unconstitutional, or contrary to the liberties and privileges of the subject. As we have shown that the law under which they act is consistent with the other laws by which the whole community are bound, and that in reality they are authorized to act by precisely the same law which authorizes all private individuals, we need not detain our readers by proving the complaints to be unfounded; but will merely allude to some of the causes to which the mistake may be attributed. In almost all nations, and at different periods of our history in England, the soldiers have been the agents of despotic power,—it is therefore assumed that they will again act in the same capacity : they have sometimes been employed to restrain the constitutional privilege of meeting and petitioning,—a recurrence of the same conduct is therefore anticipated. Again, they have been required to enforce obnoxious laws, laws perhaps in themselves of an oppressive character,—and the nature of the law has been confused with the character of those who carry it into execution. But the badness of a law supplies no charge against the agent who brings it faithfully into operation ; and

acts of tyranny are not now to be anticipated, merely because they were committed in ancient times, when the checks and restraints upon government were adjusted less favourably to the maintenance of public liberties. If it were carefully borne in mind that the law military conforms to the civil law ; that, if an arbitrary minister endeavours to employ the army for illegal purposes, there is a remedy in the civil courts ; that the refusal to re-enact the military law would at once annihilate this engine of his power ; that the number of the army depends entirely upon the legislature, and most especially upon that part of it which represents the people and has the exclusive authority over the soldiers' pay—it would at once be acknowledged that very little danger is to be apprehended from the mere employment of the military force, whilst it would be by no means difficult to prove that we should run the greatest risk by unduly diminishing it.\*

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### PRÆMUNIRE

PRÆMUNIRE is a species of offence more immediately affecting the king and his government, though not subject to capital punishment ; it is called præmunire from the words of the writ preparatory to its prosecution ; "*præmunire facias A. B.*" that is, cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged ; which contempt is particularly recited in the preamble to the writ. It took its original from the exorbitant power claimed and exercised in England by the pope, which, even in the days of blind zeal, was too heavy for our ancestors to bear.

King Edward I., a wise and magnanimous prince, and justly styled the English Justinian, set himself in earnest to shake off this servile yoke. He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulls and processes ; invading Scotland in defiance of one, and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain, thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed up. And one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed

\* The above article is extracted from the *Law Magazine*, and is not only of itself a subject of considerable importance, and ought to be generally known, but it forms an excellent commentary on the preceding charge of lord chief justice Sir Nicholas Tindal, at Bristol.

as a traitor, according to the ancient law. And in the 35th year of his reign was made the first statute against papal provisions; being, according to Sir Edward Coke, the foundation of all the subsequent statutes of *præmunire*, which is ranked as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the writ for the execution of all these statutes, the words *præmunire facias*, being used to command a citation of the party, here denominated in common speech not only the writ, but the offence itself, of maintaining the papal power by the name of *præmunire*. The statute 26 Rich. II. c. 5, which enacts, "that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against him, as in other cases of provisors."

The penalties of *præmunire* seem to have kept the depressing power of the pope within the proper bounds of their original institution, up to the reign of Elizabeth; but, they being pains of very considerable consequence, it has been thought fit to apply the same to other heinous offences, some of which bear more and some less relation to this original offence, and some no relation whatever.

To molest the possessors of abbey lands granted by parliament to Henry VIII. and Edward VI. is a *præmunire*.

The offence of acting as a broker or agent in any usurious contract, where above *ten per cent.* interest is taken, is a *præmunire*.

To obtain any stay of proceedings, other than by arrest of judgment, or writ of error, in any suit for a monopoly, is likewise a *præmunire*.

To obtain an exclusive patent for the sole making or importing of gunpowder or arms, or to hinder others from importing them, is also a *præmunire*. On the abolition by statute 12 Char. II. c. 24, of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods, for the king's use at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. To assert maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority *without* the king, is declared a *præmunire*. To send any subject out of this realm a prisoner into any parts beyond the seas, is a *præmunire*, and also a breach of the *habeas corpus* act, and is incapable of the king's pardon, besides other heavy penalties. Persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy,

upon tender by the supreme magistrate, are subject to the penalties of a *præmunire*. Sergeants, councillors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and without having subscribed the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or not. To assert, maliciously and directly, by preaching, teaching, or advisedly speaking, that the male descendants of James II. or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms, or that the king cannot make laws to limit the descent of the crown; such preaching, teaching, or advisedly speaking, is a *præmunire*, and writing, printing, or publishing the same doctrines amounted to high treason. If the peers of Scotland, when assembled to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. All unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject the parties to the penalties of a *præmunire*.

All such as knowingly and wilfully solemnize, assist, or are present at any forbidden marriage of such of the descendants of the body of George II. as are, by that act, prohibited from contracting matrimony without consent of the crown, incur the penalties of the statute of *præmunire*.

Its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir E. Coke; "that from the conviction the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king, and that his body shall remain in prison at the *king's pleasure*, or *during life*; which is the same thing, as the king by his prerogative may at any time, remit the whole or any part of the punishment, except in the case of transgressing the statute of *Habeas Corpus*. Such delinquent, though protected as part of the public from public wrongs, cannot bring an action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance, which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief."

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## BRITISH PARLIAMENT.

IN selecting and abridging the account of the British and Scottish parliaments, I have given not only the spirit of the authors quoted at the conclusion of the articles, but their very words, and have endeavoured to

observe the utmost impartiality. Although the Bills for the Reform of Parliament have given the British empire, on whose widely extended dominions the sun never sets, a new constitution, yet as many parts of the old fabric still remain, I have given, in the following work, an account of those institutions which have been the means, under God, of rendering this empire happy and glorious at home, and the envy and admiration of the world abroad,

This royal throne of kings, this scepter'd isle,  
This earth of majesty, this seat of Mars,  
This other Eden, demi-paradise;  
This fortress, built by Nature for herself,  
Against infection, and the hand of war;  
This happy breed of men, this little world;  
This precious stone set in the silver sea,  
Which serves it in the office of a wall,  
Or as a moat defensive of a house,  
Against the enemy of less happier lands;  
This blessed plot, this earth, this realm, this *Britain*,  
This nurse, this teeming womb of royal kings,  
Fear'd by their breed, and famous for their birth.

*Richard II. Act II. Scene 1.*

In marking the origin of parliaments, I have chiefly followed the authority of Judge Blackstone; but it may be remarked, that much difference of opinion exists among lawyers of the greatest reputation upon this interesting subject; but however much constitutional writers differ from each other in their opinions respecting the institutions of our Saxon ancestors, (whose tenacious adherence to ancient customs and landmarks is proverbial,) they all agree in affirming, that there was no such thing as a house of commons in existence previous to the year 1265, which was the 49th of Henry III.; for the Saxon Witenagemotte cannot be considered as a parliament in the sense in which we understand that word. Henry III. was the first English sovereign who summoned by writ, knights and burgesses, as representatives of their counties and boroughs, to *serve* him in parliament, a service which was then, and for many ages afterwards, considered as a grievous burden, a heavy expense, and a great hardship; indeed it frequently happened that the boroughs were obliged to allow their representatives a sum of money to defray the expenses of their attendance in parliament. At its first institution, parliament met in one house or chamber, the three estates, viz. the Prelates, the lay Peers, and the Commons, sat and voted together as one body; but this proving inconvenient, and the commons requiring frequently to retire for consultation, about such affairs as more immediately affected their own estate, their final separation and meeting in another house by themselves, was effected about the year 1295. in the reign of Edward I. From that period to the grand rebellion, their importance gradually increased, and since the Revolution of 1688, the

crown has from time to time conceded to the house of Commons that power and authority which constitutes its present greatness. The Scottish parliaments were constituted similarly to the English; the last parliament which sat in Scotland, was that which enacted the incorporating union between the two kingdoms, and before the Revolution of 1688; it also contained *three estates*, viz. the spiritual and lay peers, and the commons, who all sat and voted together in one house; but at the Revolution, the convention parliament, which met at Edinburgh in April, 1689, deprived the bishops of their seats, and there remained only *two estates* in that convention which offered the crown of Scotland to the prince and princess of Orange, and of that parliament which passed the act of union, and thereby voted their own annihilation.

The following observations are extracted from Professor Park's "Lectures on the Theory and Practice of the Constitution," delivered at King's College, London, in the commencement term.

"The accredited theory of the Constitution assigns the business of legislation to *parliament indiscriminately*; it does not confer the right of introducing bills of projects of law, nor yet subjects of debate, upon any particular person or persons; and even in point of practice, bills may be introduced, and motions made, by any individual member of the legislature who chooses; that is to say, by any one of six hundred and fifty-eight individuals in the house of Commons, and four hundred and eight in the house of Lords; and such bills are precisely of the same validity, if passed, as bills introduced by the executive government, or king's ministers. We have only to apply this theory to the business of the *administrative government*, and to suppose that government carried on by the undisturbed means, which this theory of the constitution has pointed out,—*legislation casually and promiscuously originated*,—to see with one glance, that a greater absurdity never entered the heart of man. Administrative government has become the most profound and the most complicated of all sciences. From the extent and intricacy of its materials, it mates and masters the most powerful intellects; while from that very extent, and the inability of the human mind to grasp all its relations and dependencies, or to contemplate more than a portion of the whole field, that portion with which the particular observation or experience of each has made him most conversant, it furnishes room for a more endless diversity and gradation of opinion, than is to be found in any other science founded upon induction. Now in all sciences, in medicine, in mathematics, in chemistry, in astronomy, in law, we find not only the most various measures of capacity and power, among the professors, but we find in each, a very few minds capable of penetrating immeasurable distances beyond even the range of the highest order of ordinary minds, and upon whom, in each of those sciences, an ascendancy or superiority devolves, which is strictly consonant to the nature



of things, and which is only an extension of the same principle which gives ordinary intelligence and information an ascendancy or superiority over dullness and ignorance. One man *can* do, another man *cannot* do, and that is the whole matter.

“ We find that no sooner is an administration formed, than it immediately takes upon itself not only what is properly called the *executive* government, but another and much more important function, not recognized by the theory of the constitution,—the management, control, and direction of the whole mass of political legislation, according to its own views of political science and civil economy ; that although some scattered portions of legislation are gladly left by this overburdened administration to private individuals, who are desirous, either through vanity or public spirit, of signaling themselves as legislators, yet that even this is done, as it were, by the connivance of the administration, or *government*, as it is emphatically called ; and that it follows as a necessary consequence, from government being always in the majority in the house of Commons, that no private individual could carry any measure through parliament which government should see reasons to oppose,—so that a single intimation of such intention, at once compels the private legislator to drop or withdraw his measure ; that even this connivance at private legislation is not considered constitutional or becoming, when the measure is one of political importance, as it is deemed not merely the *right* but the *duty* of government, to take upon itself the responsibility of introducing such measures into parliament ; and government has ever been severely reprimanded by leaders in opposition for abandoning that duty to others : finally, that as soon as from any circumstance whatever, government or the administration shall be deprived of the power of so managing, controlling, and directing the course of political legislation, by a change of the majority into the minority, or find sufficient reason to apprehend that they shall be deprived of that power, they do, according to the actual course of the constitution, resign office, upon the express ground that they can no longer carry on the government advantageously to the country ; and that, so far from doing that as an act of offended greatness, it would be esteemed politically *dishonourable* and *improper* if they were to *retain* office, after the support and adherence of a majority in the house of Commons should have been unequivocally withdrawn from them.

“ A person who is returned wholly by a particular class of constituents, becomes (so far as there is any meaning in direct representation,) a representative of the interest of *that class* ; and if, as must almost universally happen, the interest of that class, although they themselves be locally confined to a particular spot, is identical with the interests of the same class all over the kingdom, then the person does indirectly represent the interest of the whole class ; and the measure of direct representation of his own con-

stituency will be the measure of his indirect representation of that class. We might thus create a fair representation of the whole community, by selecting single spots or districts, in each of which some one class of the community is congregated, until we had fairly exhausted every class, and authorizing each of the districts to return a certain number of members. But when a person is returned for a district sufficiently large, and in which the elective franchise is sufficiently extensive to comprehend all the varieties of classes within its constituency, it becomes a *district*, not a *class* which is represented, (unless, indeed, any particular class have an overpowering predominance in that district,) and the only direct or indirect representation which appears to exist, is that of local interests, such as the affairs of rail-roads, navigations, and the particular trades which predominate within the district. So far as these interests are confined to that district, there will be direct representation only; so far as they extend to other districts, there will be indirect representation also. I have said above, as far as there is any meaning in direct representation, for I have *great doubts* whether the modern notion of direct representation, in this country of indistinct ideas, will stand scrutiny; it is curious to see how men's minds work in the dark. 'Is not *representation* a humbug?' said a very keen-sighted, but not a very scientific friend to me lately. 'Certainly', said I, 'in the sense in which it is now used: take for example the members for Westminster. What do they represent? is it opinions? whose opinions? What are the collective opinions of Westminster? is it interests? whose interests? What are the collective interests of St James's Square and Tothill Fields? and yet we may find voters from both for the sitting members. Which do they represent?'—'O,' says one, 'they represent the majority!' what majority? is it the majority on the poll? there is no majority, but the excess. There is no majority so long as the opposed candidates are equal. Who *are* the majority? those who come first, those who come in the middle, or those who come last?'—'No,' says another, 'the majority of their own voters.' How, I ask, is that majority ascertained, and where is the identity of their opinions and interests?"

The political party known by the name of whigs, were excluded from office during the reigns of the third and fourth Georges, but soon after the accession of William the IV., our present most gracious sovereign, that party obtained possession of power, and one of their first measures was to introduce bills into parliament, for altering the mode of electing the members of the house of Commons, disfranchising some boroughs, and enfranchising others, increasing the number of the county and borough electors, and especially giving to Scotland an entirely new constituency. Heretofore in that kingdom, the burgh members were elected by the respective town councils, but the reform bill for Scotland wholly disfranchises all the town councils, and confers the elective franchise in

the burghs, on every male of full age not legally incapacitated, who pays a rent of £10, and has qualified by paying the assessed taxes, on or before the 20th of August of this year, and of July in every succeeding year.

Without claiming originality, my desire has been to give the greatest mass of information in the smallest possible compass: And as the Reform Bills have now become law, I devoutly hope, that the empire may be as prosperous under their operation, as it was under our old "time-honoured" constitution.

Blackstone says, that the original or first institution of parliament is one of those matters which lie so far hidden in the obscure ages of antiquity, that to trace it out is equally difficult and uncertain. The word parliament itself is comparatively of modern date, derived from the French, signifying merely an assembly that met and conferred together. It was first applied to general assemblies of the estates of France, under Lewis VII. about the middle of the twelfth century.

It is certain, that, long previous to the introduction of the Norman language into England, all matters of public importance were debated and settled in great councils of the realm. And this general council has been established under several different names from time immemorial; such as *mychil synoth*, or great council, *mychil gemote*, or great meeting, but more generally *witena gemote*, or the meeting of wise men, so that it would appear parliaments, or great national councils, were coeval with the kingdom itself. How these parliaments were summoned is matter of dispute, and particularly, if the commons were summoned at all: it is generally agreed that the main constitution of parliament which now exists, was not marked out before the year 1215, being the year in which King John granted to England the Great Charter, and in which provision is first made for admitting the commons of England to a share of the legislation. In *Magna Charta*, king John promises, for himself and his heirs and successors, to summon all archbishops, bishops, abbots, earls, and greater barons, personally: and all other tenants in chief under the crown by the sheriffs and bailiffs: to meet at a certain place, with forty days' notice, to assess aids and scutages, when necessary. There was no such thing in existence as a house of Commons, till the year 1266, being the 49th of Henry III., when writs, which are still extant, were, for the first time, issued by the crown to summon knights, citizens, and burgesses, to attend and give their advice to the king in parliament.

Parliament is summoned by the king's writ, regularly issued out of chancery, by advice of the privy council, at least forty days before it commences its sittings. It belongs *exclusively* to the royal prerogative to summon parliaments: no parliament can be convened by its own authority, or by any other authority than that of the king alone, for the

crown (under God) is the source and fountain of all power within the realm. If the same persons who compose the parliament, should meet as a parliament without the king's writ, they would be guilty of high treason, and all their enactments as a parliament would not only be null and void, but treasonable by the law. In all cases of conquest or successful rebellion, as in the rival houses of York and Lancaster, the law submitted to the powerful; and whichever of these houses won the field, never missed a parliament to confirm their title: even Cromwell found a parliament to support his usurpation. In all the concessions of the crown to parliament, it has ever preserved to itself this prerogative, and for very good reasons. In the *first* place, For its own preservation, because parliament derives its whole authority from the crown, and the law of England has absolutely barred all coercion on the crown, as whoever had the power of coercion would be superior to the crown, which would destroy the very foundation of the government; and the power that is derived from the crown cannot be on a level, far less superior, to it. Both houses of parliament call the king their sovereign lord, and style themselves his most dutiful and obedient *subjects* and servants, and swear allegiance to him; And, *secondly*, Because, supposing parliament had a right to meet without being called by the king, it is impossible to imagine that all the members, and each of the houses would unanimously agree upon the proper time and place of meeting; and, if one half of the members should meet and the other half absent themselves, who shall determine which is really the parliament, the part that assembles, or that which stays away? But the crown, by preserving to itself the prerogative of calling parliaments together, prevents confusions and revolutions, which would set every private person on the throne, and introduce an anarchy, which would admit of neither order nor remedy.

But although the parliament cannot meet without the king's writ, yet, at the Revolution in 1688, a *convention* of the preceding parliament assembled in London, which was afterwards, by the authority of the crown, turned into a parliament. The throne had become vacant, before the convention met without any royal summons. They did not assemble without writ, and make the throne vacant, but the throne being previously vacant by King James II.'s abdication, they assembled without any writ, as they must have done, if they assembled at all. Had the throne been full, their meeting would not merely have been irregular, it would have been high treason; but, as the king had abdicated, such meeting became absolutely necessary. In this convention, the three estates of the realm declared the throne to be vacant, and recognised the succession to be in Mary, the eldest daughter of the late king, who succeeded to the throne, according to the order of the descent of the crown of England, with whom the Prince of Orange, her husband, was associated in the government. There was thus

no change in the constitution, the throne being filled by hereditary succession; in proof of this, it may be remarked, that the entail of the crown went to the heirs of Queen Mary, and not to those of the Prince of Orange, which shows that his administering the government, was no infraction on the hereditary descent of the crown. The first statute of William and Mary explains the grounds of that revolution, and of the settlement then made,—“And whereas the late King James the Second, having *abdicated* the government, and the throne being thereby vacant,” &c. This statute also settles the point of the three estates of which parliament is composed, which, meaning the late convention which met without any authority of the king or queen, says, “Whereas the lords spiritual and temporal, and commons, assembled at Westminster, representing *all* the estates of the people of this realm,” &c. therefore, the king is *not* an estate of parliament, for here were three estates without him.

The Revolution parliament repealed several former laws, but they left untouched, and in their full force, such statutes as declared the supremacy of the crown, and condemned any coercion upon it. Such as 16th Rich. II. which declares, “That the crown of England hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God, in all things touching the regality of the same crown, and to none other.” The 24th Henry VIII. which recognises the king as the “one *supreme* head and king, unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spirituality and temporality, been bounden and owen to bear, next to God, a natural and humble obedience. He being also instituted and furnished, by the goodness and sufferance of Almighty God, with plenary whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folks, resiants, or subjects, within this his realm, in all causes, matters, debates, and contentions,” &c. The 12th Car. II. wherein it is declared:—“That by the undoubted and fundamental laws of this kingdom, neither the peers of this realm, nor the commons, nor both together, in parliament or out of parliament, nor the people, collectively or representatively, nor any other persons whatsoever, ever had, have, or ought to have, any coercive power over the persons of the kings of this realm.” The 13th Car. II. which makes it a *præmunire*, either by “writing, printing, preaching, or other speaking, to declare or affirm, that both houses of parliament, or either house of parliament, have or hath a legislative power without the king;” and it also declares the power of the sword to be wholly in the king; “and that both or either of the houses of parliament cannot, nor ought to pretend to the same, nor can, nor lawfully may raise or levy any war, offensive or defensive, against his majesty, his heirs, or lawful successors; and yet the contrary thereof hath of late years been practised, almost to

the ruin and destruction of this kingdom, proceeding from the wilful mistake of the supreme and lawful authority." All these laws, and many more, were left unrepealed at the Revolution, which shows that it was in the *person*, and not the government, that our revolution proceeded.

Blackstone, in his Commentaries, proceeds to say, that the constituent parts of a parliament are the next objects of inquiry. "And these," says he, "are the King's Majesty sitting there in his royal political capacity, and the three estates of the realm; the Lords Spiritual, the Lords Temporal, (who sit together with the king in one house,) and the Commons, who sit by themselves in another house. And the King, and these *three estates* together, form the great corporation or body politic of the kingdom, of which the King is said to be *caput, principium, et finis*. For, on their coming together, the King meets them, either in person or by representation, without which there can be no beginning of a parliament; and he also has *alone* the power of dissolving them."\*

The same high authority goes on to say, that the legislature, therefore, cannot abridge the executive power of any rights which it still retains, without its own consent, since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein, indeed, consists the true excellence of the English government, that all its parts form a mutual check on each other. In the legislature, the people are a check upon the nobility, and the nobility again act as a check upon the people, by the mutual privilege of rejecting what the other has resolved, while the King is a check upon both, and which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege which has been conceded to them by the crown, of inquiring into, impeaching, and punishing the conduct of the King's evil and pernicious councillors. The King can constitutionally do no wrong, and were parliament to pass censures on him, it would destroy his constitutional independence, render him inferior to his parliament, and destroy his supremacy entirely. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest;—for the three estates, naturally drawing in different directions, of opposite interests, and the prerogative of the crown in another still different from the two houses, they mutually keep each other from exceeding their proper limits, while the whole is prevented from separation, and are artificially connected together by the mixed nature of the crown, which is the *caput, principium, et finis*, the beginning, the middle, and the end of the legislature, and the *sole executive power*. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from that which either, if

\* Blackstone, B. i. c. 2.

acting by itself, would have done ; and, at same time, in a direction partaking of each, and formed out of all, a direction which constitutes the true line of liberty and happiness of the community.

The first estate of parliament is the Spiritual Lords, who consist of two archbishops and twenty-four bishops for England, and, since the Union with Ireland, four Spiritual Lords of that kingdom sit by rotation of sessions in the House of Lords, making the number for the United Kingdom thirty. At the dissolution of the monasteries by Henry VIII., the first estate, besides the bishops, consisted of twenty-six mitred abbots and two priors, and were then, in point of numbers, equal to the Temporal Lords. The bishops hold certain ancient baronies under the King. But, though these Lords Spiritual be, in the eye of the law, a distinct estate from the Lords Temporal, and are so distinguished in our acts of parliament, yet, in practice, they are usually blended together under the one name of *the Lords* ; they intermix in their votes, and the majority of such intermixture joins both estates.

Sir Edward Coke says,\* that a bishop is regularly the King's immediate officer of justice in causes ecclesiastical ; all the (temporalities of the) bishoprics in England are of the King's foundation, and the King is patron of them all ; at first they were donative, as appears from all law-books, acts of parliament, and history, and that was *per traditionem annuli et pastoralis baculi*, i. e. by the crosier. King Henry I. being persuaded by the bishop of Rome, refused to consent to their being elected by their chapters ; but King John, by royal charter, acknowledging the custom and right of the crown in former times, yet granted, *de communi consensu baronum*, that they should be elective, which was afterwards confirmed by divers acts of Parliament. Afterwards, the manner and order, as well of the election of archbishops and bishops, as of the confirmation of their election and consecration, is enacted and expressed in the 25th Hen. VIII., which is still unrepealed, but remains in full force and effect.

The second estate of parliament is the Temporal Nobility, which consists of all the peers of the realm, of whatever title of nobility. All the ancient peers sit by descent, because their titles are hereditary. The new made peers take their seats from the date of their creation, and the Scottish peers, since the union with that ancient kingdom, sit as representatives of the whole body of the Scottish nobility, and are elected for each new parliament.

The distinction of rank and honour is necessary in every well governed state ; as a reward for eminent public services in a manner the most desirable to individuals, and yet without any burden to the community ; exciting an ambitious yet laudable, arduous, and generous emulation in every

\* Lib. ii. c. 11, sect. 201, p. 134.

class of the people. However dangerous these generous emotions might be in a republic, they will certainly be attended with the happiest effects under a free monarchy, when, without destroying its existence, or disturbing the public peace, guilty ambition will be continually restrained by the superior power, the sovereign, from which all honour is derived. A desire for advancement, when rationally diffused, gives life and vigour to the community, it sets all the wheels of government in motion, which, under a wise and patriotic sovereign, may be most beneficially directed : and, in consequence, every individual may be made subservient to the good of the public, while he exclusively seeks only to promote his own private views. A body of nobility is also more peculiarly necessary in our mixed and compound constitution, in order to support both the rights of the crown and the people, by forming a barrier to withstand the encroachments of each. It creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince ; rising like a pyramid from the broad foundation of the people, and diminishing to a point as it rises, the sovereign being its apex. The nobility being the pillars raised up from among the people, more immediately to support the throne.

The third estate is the Commons, who sit in a house by themselves, which is frequently called the *Lower House*, in contradistinction to the House of Lords, or the Upper House. The old constitution of this house is, that the counties are to be represented by knights, elected by the proprietors of lands ; and the cities and boroughs to be represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation. In the year 1832, a bill was passed, which greatly extended the right of suffrage, and altered in a small degree the number of representatives for each of the three kingdoms. This is commonly called the Reform Bill, and an abstract of it will be found in another part of the volume. The number of representatives in the British House of Commons formerly was 668, of whom 513 were for England and Wales, 45 for Scotland, and 100 for Ireland. Every member says Blackstone, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is *not* particular, but general, not barely to advantage his constituents, but the commonwealth, “to advise his Majesty,” (as appears from the writ of summons,) “in the great council of the nation, touching certain difficult and urgent affairs concerning the King, and defence both of the kingdom and church of England.” And, therefore, *he is not bound*, like a deputy in the United Provinces, or the Congress of North America, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper and prudent so to do.

The house of Commons only gradually attained to its present importance ; it was not till the reign of James I. that the universities enjoyed



the permanent privilege of being represented there. Indeed, so little were the advantages of the Lower House of Parliament understood, that, in the reign of Edward I., no intelligence could be more disagreeable to any borough than to find that it must elect, or to any individual than that he was elected, to a trust to which no honour was then attached. At that time, it was usual for the members to give sureties for their attendance before the king and parliament, their expenses being respectively borne by their constituents. But the weight and influence of the house of Commons increased from time to time, till it arrived at its present rank and authority in the legislature.

These, says Blackstone, page 160, are the constituent parts of a parliament, the King, who is the *caput, principium, et finis*, the Lords Spiritual and Temporal, and the Commons,—parts, of which each is so necessary, that the consent of all is required to make any new law that shall be binding upon the subject. Whatever is enacted for law by one or by two only of these, is no statute, and no regard is due to it, unless in matters relating to the privileges of either house. And at the restoration of Charles II., when the constitution rose from the ruins into which Cromwell had crushed it, it was particularly enacted, 13th Car. II. c. 1, “That if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority *without* the king, such person shall incur all the penalties of a *præmunire*.”

Our monarchy is said to be a limited one; and, therefore, for the better understanding of this common expression, a term which is of daily occurrence, it may not be unnecessary to say a few words on the subject of limitation. There are limitations of concession and of coercion; both are always the act of a superior to inferiors. Thus the Almighty was pleased to limit himself, when he made covenants with, and granted conditions to mankind, and is obliged by his veracity to perform them. Fathers may also limit themselves to their children, and kings may limit themselves to their subjects, by granting them certain laws and privileges, and giving them his solemn oath to observe and keep them. Laws were made by kings, therefore kings must have been in existence before the laws; no law can be produced that made the first king in England. We have been governed by kings as far back as history can carry us, and all the laws of England were made by kings, by the advice of parliament. Parliament recognises our kings, as particularly specified in the act 1st Eliz. and 1st James I. wherein parliament acknowledged the prior right of these sovereigns from proximity of blood, but made no pretence of conferring the crown as at the disposal of parliament, but acknowledged their right and title to be from God, “and thereunto we most humbly and faithfully do submit and oblige ourselves, our heirs and posterity for ever, until the last drop of our blood be spent.”

*Magna Charta*, which begins the statute book, is wholly an act of concession on the part of King John, and granted, as it so expresses, entirely of his free will. There was no house of Commons till after the concession of the great charter, when, as before mentioned, Henry III. first summoned the commons to aid the crown with their advice, when the style of enactments was—"Be it enacted by the king," or, "our sovereign lord the king hath ordained, by the advice of the lords, and the humble petition of the commons." At that time, it was the privilege of the lords to advise, but the commons petitioned; the prerogative of enacting was wholly in the crown. By subsequent acts of concession, the king has limited his prerogative not to make laws without the advice and consent of the three estates of parliament, yet he has not given up any of his prerogative to them, for he alone can make an act of parliament to be law; not by way of a negative voice, for all the negatives in the world will never make a positive. A negative is only the saying this shall not be law. But the king's saying, this act shall be a law, and putting his name to it, makes it law. It is the king *alone* who can say, "*Le roy le veut*," the king wills this to be a law, and this makes it law. The present style of acts of parliament is, "Be it enacted by the King, with the advice of the Lords Spiritual and Temporal, and Commons, and by the authority of the same." Here the power of *enacting* rests wholly in the king, the power of *advising* is in the three estates; to advise and consent is one thing, to enact is another; "by authority of the same," is the king's authority, who enacts, and that of the lords and commons, who advise. "In the multitude of counsellors there is wisdom."

The king of Great Britain, therefore, is the greatest potentate on earth, and under him, and deriving their being and authority from him, the parliament of England is the most august and powerful national assembly in the whole world. The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined either for causes or persons within any bounds. It has authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. The king in this place is incontrollable, this being the place where that absolute despotic power, which must, in all governments, reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations, and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate and new-model the succession to the crown, as was done in the reign of Henry VIII. and his three children and successors. It can change and create afresh even the constitution of the kingdom, and of parliaments themselves, as was done by the Act of Union, and the several statutes for

triennial and septennial elections, and as has been recently done by the passing the Bills for the reform of parliament. In short, it can do every thing that is not naturally impossible; and, therefore, some have not scrupled to call its power, by a figure certainly too bold—the omnipotence of parliament. This figure of speech applies to the king alone in the exercise of his prerogative, and it is true that what the king and parliament doth, no authority on earth can undo. So that, continues Sir E. Coke, it is a matter most essential to the liberties of this kingdom, that such members be elected for this important trust, as are most eminent for their probity, their fortitude, and their knowledge, for it was a known apothegm of the great lord treasurer Burleigh, “that England could never be ruined but by a parliament;” and, as Sir Matthew Hale observes, this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any ways fall upon it, the subjects of this kingdom are left without all manner of remedy.

In order to prevent the mischiefs that might arise by placing such extensive privileges in hands, that are either incapable or improper for its management, it is provided by the custom and law of parliament, that no member shall sit or vote in either house before he is twenty-one years of age. And it is enacted by statute 7th Jac. I. c. 6, that no member be permitted to enter into the house of Commons, till after he has taken the oath of allegiance before the Lord Steward, or his deputy; and by statute the 30th Car. II. and 1st Geo. I., no member shall sit or vote in either house, till he shall have taken, in the presence of the house, the oaths of allegiance, supremacy, and abjuration, and also subscribed and repeated the declaration against transubstantiation, invocation of saints, and the sacrifice of the mass. The declarations against these three articles, which excluded the members of the Latin church from both houses, and also the Test Act, was repealed in the year 1829, as preliminary steps towards a “breaking in upon the Constitution;” and by act of parliament passed for that purpose, Roman Catholic gentlemen are now eligible to sit in parliament, and to hold offices in the state, with the exception of the offices of Lord Chancellor of England, and Ireland, and the Lord Lieutenant of the latter kingdom, which three offices must always be held by Protestants. Aliens, unless naturalized, were likewise incapable to serve in parliament, but by the statute 12th and 13th William and Mary, it is declared that no alien is capable of being a member of either house of parliament.

The whole of the law and custom of parliament has its origin from this one maxim, “That whatever matter ariseth concerning either house of parliament ought to be examined, discussed, and adjudged in that house to which it relates, and elsewhere.” Hence, for instance, the lords will not suffer the commons to interfere in settling the election of one of the re-

presentative peers of Scotland ; neither will the commons allow the lords to judge of the election of a burgh or knight of the shire ; nor will either house permit the subordinate courts of law to examine or discuss the merits of either case.

The *privileges* of parliament are most extensive, and, in fact, perfectly indefinite. They were principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown, and the dignity and independence of both houses are in a great measure preserved by keeping their privileges *indefinite*, so that they can draw upon this magazine on any emergency. Henry VIII. and Elizabeth were frequently in the habit of swearing at the members of the house of commons, even striking them, imprisoning them during their own pleasure, and suffering no questions to be asked or reason given for such arbitrary proceedings. Elizabeth used to say, "That the commons ought not to deal, to judge, or to meddle with her prerogative, or with affairs of state, but to leave all such matters to those whose business it was, and who could understand them." In Townshend's collections, page 37, it is related that that redoubtable princess limited the freedom of speech of the commons to the bare voting, yea or nay, commanding them not to meddle with reforming or transforming either church or state ; and the speaker was ordered "to reject such bills, if offered, until they be viewed and considered of by those whom it is fitter should consider of such things, and can better judge of them." She also so limited the privileges of the members of the house of commons, "that no man's ill-doings or non-performance of duties, should cover or protect him." And in a petition of access to her Majesty, the commons were confined to require such only in "weighty matters," and that, too, only "when her Majesty was at *leisure*." But in the reign of Charles the I., when a fanatical spirit of insubordination was prevalent, it was esteemed breach of privilege, and a sufficient cause for a rebellion, when that injured monarch only desired *justice* against five members of the commons' house. Some of the more notorious privileges of the members of either house are,—the privilege of speech, person, their domestics, and of their lands and goods. The privilege of speech was declared by the statute 1st W. and M. to be one of the liberties of the people, "that the freedom of speech, debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." This freedom of speech, as likewise the other privileges of servants, lands, and goods, are particularly demanded of the king in person, by the speaker of the house of commons at the bar of the house of lords, at the opening of every new parliament. This privilege formerly included not only protection from illegal violence, but also from legal arrests and seizures by law process ; and even still, violently to assault a member of either house, or his menial servant, is a high contempt of parliament, and punishable with

the utmost severity. No member of either house can be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

Every peer, by license obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. "By the orders of the house, no peer can have more than *two* proxies, nor can proxies vote upon a question of guilty or not guilty." A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people. Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent, which is usually styled his protest. All bills, likewise, that may in their consequences anywise affect the rights of the peerage, are by the custom of parliament, to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

The law and customs peculiar to the house of commons relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to taxes, it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids begin in their house, and are first bestowed by them, although their grants are ineffectual, to all intents and purposes, until they have the consent of the house of lords and the sovereign. The true reason, arising from the spirit of our constitution, seems to be this,—because the lords, being a permanent hereditary body created at pleasure by the king, are supposed to be more liable to the influence of the crown than the commons, who are a temporary elective body, freely nominated by the people.

Next, with regard to the election of knights, citizens, and burgesses, we may observe, that herein consists the exercise of the democratical part of our constitution; for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. In England, the people do not debate in a collective body, but by representation; and in the choice of representatives, the laws have very strictly guarded against usurpation or abuse by many salutary provisions, which may be reduced to these three points: 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

As to the qualifications of the electors: By several statutes it has been enacted, that the knights of the shire shall be chosen of people, whereof every man shall have freehold to the value of forty shillings by the year within the county, which is to be clear of all charges and deductions, except parliamentary and parochial taxes. The knights of the shire are the representatives of the landed interest of the kingdom; their electors must, there-

fore, have estates in lands or tenements within the county represented : These estates must be freehold, that is, for term of life at least ; because, when these statutes were made, beneficial leases for terms of years were not in use, and copyholders were then little better than villeins, absolutely dependent on their lords : This freehold must be of forty shillings annual value ; because that sum would then, with proper industry, furnish all the necessaries of life, and render the freeholder an independent man. The other less important qualifications of the electors for counties in England and Wales may be collected from the statutes ; which direct, 2. That no person under twenty-one years of age shall be capable of voting for any member. This extends to members for boroughs as well counties ; as does the next also, viz. 3. That no person convicted of perjury, or subornation of perjury, shall be capable of voting in any election. 4. That no person shall vote in right of any freehold, granted to him fraudulently, to qualify him to vote, under the penalty of £40. And to guard against frauds, it is further provided, 5. That every voter shall have been in the actual possession or receipt of the profits of his freehold, for his own use, for twelve calendar months before ; except it came to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office. 6. That no person shall vote in respect of an annuity or rent charge, unless registered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or trust-estates, the person in possession, under the above mentioned restrictions, shall have the vote. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds. 9. That no estate shall qualify a voter, unless the estate has been assessed to some land-tax, and at least twelve months before the election. 10. That no tenant by copy of court-roll shall be permitted to vote as a freeholder.

The electors of citizens and burgesses are supposed to be the mercantile or trading interest of the kingdom. Such freemen only of any city or borough as claim by birth, marriage, or servitude, shall be entitled to vote therein, unless he has been admitted to his freedom twelve calendar months before.

Some of the qualifications of persons to be *elected* members of the house of Commons depend upon the law and custom of parliament, declared by the house of Commons, others upon certain statutes. From which it appears, 1. That they must not be aliens born, or minors. 2. That they must not be any of the twelve judges, because they sit in the House of Lords ; nor of the clergy, for they sit in the convocation ; nor persons attainted of treason or felony, for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers ; but that sheriffs of one county are eligible to be knights of another. 4. That in

strictness, all members ought to have been inhabitants of the places for which they are chosen: But this having been long disregarded, was at length entirely repealed by statute 14th Geo. III. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury, nor any of the officers following, viz. commissioners of prizes, transports, sick and wounded, wine licences, navy and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, army, victualling, admiralty, pay of the army or navy, secretaries of state, seal, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars; nor any persons that hold any new office under the crown, created since 1705, are capable of being elected or sitting as members. 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting. 7. That if any member accepts an office under the crown, except an officer in the army or navy, accepting a new commission, his seat is void, but such member is capable of being re-elected. 8. That all knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen. This is reduced to a still greater certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold to the value of £600 *per annum*, and every citizen and burgess to the value of £300: except the eldest sons of peers, and of persons qualified to be knights of-shires, and except the members for the two universities; which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. But subject to these standing restrictions and qualifications, every subject of this realm is eligible of common right.

Elections are also regulated by the law of parliament, and several statutes.

As soon as parliament is summoned, the Lord Chancellor (or, if a vacancy happens during the sitting of parliament, the speaker, by order of the house, and without such order, if a vacancy happens by death, or the member's becoming a peer in the time of a recess for twenty days) sends his warrant to the clerk of the crown in chancery, who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs,

commanding them to elect their members ; and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same, and to return the persons chosen, together with the precept, to the sheriff.

But the sheriffs themselves must proceed to the elections of the knights of the shire, at the next county court that shall happen after the delivery of the writ.

And as it is essential to the very well-being of parliament that elections should be absolutely free, therefore, all undue influences upon the electors are illegal, and strongly prohibited. As soon, therefore, as the time and place of election, either in the counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, and to the distance of two miles or more, and not to return till one day after the poll is ended. Riots, likewise, have been frequently determined to make elections void. By vote also of the House of Commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, have any right to interfere in the election of commoners ; and, by statute, the lord warden of the Cinque Ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presumes to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits £100, and is disabled from holding any office.

To prevent the infamous practice of bribery and corruption, it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected, on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward, be given, or promised to be given, to any voter, at any time, in order to influence him to give or withhold his vote, as well be that takes, as he that offers, such bribe, forfeits £500, and is for ever disabled from voting and holding any office in any corporation, unless before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence.

Undue influence being thus (as far as human depravity will admit) guarded against, the election is to be proceeded to on the day appointed, the sheriff, or other returning officer, first taking an oath against bribery, and for the due execution of his office. The candidates likewise, if required, must swear to their qualification, and the electors in counties to theirs, and the electors, both in counties and boroughs, are also compellable to take the oath of abjuration, and that against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath as well as the former, which, in all



probability, would be much more effectual than administering it only to the electors.

The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority, and the sheriff returns the whole, together with the writ for the county, and the knights elected thereupon, to the clerk of the crown in chancery, before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy, and this under the penalty of £500. If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI. £100, and the returning officers in boroughs, for a like false return, £40, and they are besides liable to an action, in which double damages shall be returned, by the later statutes of King William; and any person bribing the returning officer shall forfeit £300. But the members returned by him are sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by several statutes, which direct the method of choosing by lot a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence.

The method of making laws is much the same in both houses. For despatch of business, each house of parliament has its own speaker. The Lord Chancellor, or keeper of the King's Great Seal, or any other appointed by the King's commission, is the speaker of the House of Lords, whose office it is to preside there, and manage the formality of business. But if none be so appointed, Blackstone is of opinion, they may elect a speaker. The speaker of the House of Commons is chosen by the house, but must be approved by the King. And in this particular the usage of the two houses differs, that the speaker of the House of Commons cannot give his opinion, or argue any question in the house; but the speaker of the House of Lords may, if he is a lord of parliament. In each house, the act of majority binds the whole, and this majority is declared by votes openly and publicly given.

An adjournment is no more than a suspension of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day, and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But an adjournment of one house is not an adjournment of the other.

A prorogation is a continuance of the parliament from one session to another, as an adjournment is an interval of the session from day to day. This is done by the royal authority, expressed either by the Lord Chancellor in his majesty's presence, or by commission from the crown, and fre-

quently by proclamation. Both houses are necessarily prorogued at the same time, it not being a prorogation of either house, but of the whole parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed or judgment given in parliament, it is in truth no session at all. And if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king can call them together by proclamation, with fourteen days' notice of the time appointed for their re-assembling.

A dissolution is the civil death of a parliament, and this may be effected in three ways:—1. By the king's will, expressed either in person or by representation; for, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence.

2. A parliament is dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign, for he, being the head of the parliament, (*caput, principium, et finis*,) that failing, the whole body was held to be extinct. It was enacted by statutes 7th and 8th W. III. and 6th Anne, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor. That if the parliament be at the time of the king's death separated by adjournment or prorogation, it shall notwithstanding assemble immediately, and take the oaths to the new sovereign: and that if no parliament is then in being, the members of the last parliament shall re-assemble, and be again a parliament.

3. *Lastly*, A parliament may be dissolved, or expire by length of time; so that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by royal prerogative.

When the king comes down, he sits at the upper end of the house of Lords, on a throne or chair of state; having a cloth of state over his head, under which none but the Royal Family stand. He is always present, either in person or represented by commission, at the opening of a new Parliament, and at the passing of bills; some kings, but especially queen Anne, have been present at solemn debates, but it is not customary, being a restraint on the freedom of speech absolutely necessary in parliamentary proceedings. On the king's right hand, is a seat for the prince of Wales, and on the left, one for the duke of York. On the right of the throne and next the wall, are placed on a bench, the two archbishops; below these, the bishops of London, Durham, and Winchester; then upon other benches on the same

side, all the rest of the bishops, according to the priority of their consecration.

On the left of the throne, the lord Chancellor, President of the council and lord privy seal, sit; if they are barons, above all dukes except those of the royal family. The dukes, marquesses, and earls sit on the same side, according to the date of their creations. On the first bench across the house, below the wooolsacks sit the viscounts; and upon the next bench, the barons sit all in order.—The Great chamberlain, the Constable, the Marshall, the lord high Admiral, the lord Steward; and the king's chamberlain by act of parliament, are entitled to sit above all other of the same degree of nobility with themselves. If the chief secretary be a baron, he sits above all barons not having any of the above offices. The rest of the peers sit according to the order of their creation.

When the king is present, the lord Chancellor stands behind the throne; but at other times he sits on the first wooolsack, his great seal and mace before hand: he is the speaker of the house of lords. The judges, the king's council at law, and the masters in chancery sit on other wooolsacks; these sit in parliament, to give their advice when asked, but not being Peers have no suffrage. Formerly, on the lowermost wooolsack were placed the clerk of the crown, and the clerk of parliament; the former being concerned in all writs of parliament and pardons; the latter records the transactions of parliament, and keeps its records. This clerk, has also two clerks under him, who used to kneel behind the same wooolsack, and write upon it; but they now sit at a table. Without the bar sits the first gentleman usher, called the "black rod," from a black staff which he carries in his hand, under whom is a yeoman usher that waits at the door within, a crier without, and a sergeant at mace always attending the lord Chancellor.

When the king is present with the crown on his head, the lords are all uncovered. The judges stand till the king gives them leave to sit. When the king is not present, the lords at their entrance do reverence to the throne; the judges may then sit, but must not be covered till the lord Chancellor signify to them the leave of the house. The king's council and masters in chancery sit also, but may not be covered at all.

In the house of Commons, the members sit promiscuously: the speaker's chair is fixed in the middle of the house towards its upper end; and the clerk with his assistant sits near him at the table, just below the speaker's chair. The commons do not wear robes as the lords do, except the speaker and clerks, who always in the house wear gowns, and the former a wig, sometimes lawyers also in term time wear their gowns, the four members that used to represent the city of London wore scarlet gowns on the first day of a new parliament, and sat altogether on the right hand of the chair, next the speaker.

Upon the day fixed in the writ of summons, the sovereign comes in person or by commission to open parliament. On the king's arrival at the house of Peers, twenty-one great guns are discharged on the opposite side of the Thames; which salute is repeated when the king retires. In a room called the prince's chamber, the king puts on his crown and robes, and from thence the lord Chamberlain conducts him into the house of lords: and, taking his seat on the throne, he summons the Commons by the gentleman usher of the black rod. He knocks at the door of the house of Commons, which is immediately opened by the sergeant at arms; at the bar of the house the usher makes a bow, and advancing a few steps, a second, and a third, saying. "Gentlemen of the house of Commons, the king commands this honourable house to attend him immediately, in the house of peers:" he then retires backwards, bowing, and withdraws. The Commons forthwith attend his majesty in the house of Lords, and are in the king's name commanded by the lord Chancellor to choose a speaker. On their return to their own house, they elect one of their own members, whom on another appointed day they present to the king sitting on the throne, or to his commissioners, who having approved of their choice, the new speaker then petitions his majesty that during their sitting the commons may have free access to his majesty, freedom of speech in their own house—and freedom from arrests. After which the king reads his speech, the whole house of Commons being presumed to be present at the bar of the house of Lords.

The following is the manner of choosing the speaker, any member of the house standing up in his place, and making a short introductory speech, moves that such a member of the house as he then names, may take the chair, and being seconded in that motion by some other member, if the election is not contested, they lead the member so named from his seat to the bar of the house, from whence they conduct him, bowing three times, up the house to the chair, where being placed, he stands up, and returns thanks to the house for the honour they have done him, and modestly acknowledges his inability to perform such a trust, desires the house would make choice of some more able person, which being of course disallowed, he submits to their pleasure: and, after receiving the directions of the house about the usual requests to be made to the king, adjourns it to the day appointed. On which occasion, the usher of the black rod being again sent to summon the Commons, he alters his stile and addresses himself to the speaker. But if there is a contest, some other person being proposed and seconded as before, it is determined by a question, as in a committee of the whole house, by changing sides; the clerk of the house putting the question, he being a patent officer for life, and is always present on such occasions, to whom during the contest all speeches or motions are directed,

and from courtesy, the persons nominated for speaker, always vote for each other.

Before they can proceed to business, even before the choice of a speaker, the members must take the oaths of allegiance and supremacy, in the presence of the lord Steward of his majesty's household. After the choice of the speaker, they take the said oaths again at the table, and formerly declared and subscribed their opinions against the doctrine of transubstantiation, invocation, and adoration of saints, and the sacrifice of the mass: but in 1879 the statute enforcing the subscription against these doctrines was repealed, and the oaths only remain.

Any member of parliament may move for leave to bring in a bill; when the question is put and agreed to by the house, the person making the motion, and those who second it, are then ordered to prepare and bring in the bill; which when ready, the mover presents; reading the order at the side bar, and desires leave to bring it to the table, which being agreed to, the bill is sometimes immediately read for the first time, if not, it may be read at any other time, by the clerk at the table, which the house agrees to; after which the speaker taking the bill in his hands reads the preamble, and after the debate, if any, he puts the question whether it shall be read a second time, and when: after the second reading, the question is put whether it shall be committed, which if the bill is of great importance is usually to a committee of the whole house, if it is of inferior moment to a private committee, any member at pleasure naming the persons to be on the committee, whose names being read by the clerk at the table, they are ordered to meet in the speaker's chamber, and report their opinion to the house. When the Committee meets they choose a chairman, and either adjourn to some future time or immediately proceed to consider the bill: the chairman first causes a clerk attending the committee to read the bill, then he reads it himself paragraph by paragraph, putting every clause to the question, filling up the blanks, and making amendments according to the opinion of the majority of the committee, of whom there must be eight of the persons named to proceed regularly, though five may adjourn. When the Committee, have gone through the bill, the chairman by directions of the committee makes his report at the side bar of the house, reading all the additions and alterations made by the committee, and how any of these amendments have changed the scope of the bill, and what connexion they have with it, the clerk having at the committee written down in what folio and line of the bill those amendments are to be found; and if it has been thought fit by the committee to add any clause, they are marked alphabetically and read by the chairman, who then moves to have leave to bring up the report to the table; which being agreed to, he does, and delivers it to the clerk, who reads all the amendments, and clauses, the speaker putting

the question whether they shall be read a second time ; and if agreed to, reads them himself ; and as many of them as the house agrees to, the question is put whether the bill so amended shall be engrossed, that is to say, written fair in parchment, and read the third time some other day : and then the speaker, holding the bill in his hand, puts the question whether the bill should pass : if the majority is in its favour, then the clerk writes on it *Soit baille aux Seigneurs* ; but if the bill passes through the house of peers, then it is *Soit baille aux Communes*. When an engrossed bill is read, and any clauses are offered to be added to it, they must be engrossed in parchment like the bill, which are then called *Riders*, and if agreed to are then added to the bill.

Petitions are offered in the same manner as bills at the bar of the house, brought up by the member who presents them, and are delivered at the table. All messages from the lords, as likewise all persons appearing at the bar of the house, are introduced by the sergeant in attendance with his mace on his shoulder.

While the speaker is in the chair the mace is always laid upon the table, except when sent upon any extraordinary occasion into Westminster Hall and Court of Requests to summon the members to attend. But when the house resolves itself into a committee of the whole house, the mace is laid under the table, and the chairman to that committee takes the chair where the clerk of the house usually sits. To make a house in the Commons, forty members are requisite, and eight for a committee ; the house generally begins by reading some uncompleted bill from last session.

After the speaker and members have taken the oaths, the standing orders of the house are read, and grand committees appointed to sit on usual days. When any member stands up to speak, he must be uncovered, but in strictness and regularity he ought to sit with his hat on. When the speaker finds several bills prepared to be put to the question, he gives notice the day before, that to-morrow he intends to put such bills to the third reading, and desires the special attendance of all the members. And if a bill is rejected it cannot be again proposed during the same session. One mode of rejecting a bill, is by moving, that it be read that day six months, which if carried puts an extinguisher upon it.

When a Bill is sent up by the commons to the peers, it is usual for a certain number of the members to attend, to show their respect, and as they approach the bar of the upper house, the member who presents the bill makes three profound reverences, saying, "The commons have passed an act entitled, &c., to which they desire your lordships' concurrence : " The lord chancellor walks down to the bar and receives it.

When the lords send down a bill to the commons, it is delivered by one of the masters in chancery, or other person whose place is on the wool-sacks, who approaches the speaker, and, bowing three times, delivers the

bill to him after reading the title, and desires it may be there taken into consideration. If it passes the house *Les communes ont assentez* is written on the bill. All messages from the commons to the lords, are introduced by the black rod, and those from the lords, are presented by the serjeant, who, with his mace on his shoulder, and walking on their right hand, makes with them three bows as they draw near to the speaker, and then deliver their message; they do the same as they retreat, keeping their faces always to the chair. When the messages are of great importance, the lords send one or two of the judges to the house of commons.

In the commons, when a member speaks, he stands up, takes off his hat, and addresses his speech only to the speaker; but cannot speak twice in the same debate, unless the whole house be turned into committee, and then every member may reply as often as he himself or the chairman judges it necessary. If any one in either house, speaks words of offence against the king's majesty or to the house, he is called to order by the speaker, and may be reprimanded at the bar; but if the offence be very great, he is liable to be sent to the Tower. The speaker takes no part in the debates, but only makes a short and plain narrative, he does not vote unless the house be equally divided.

The peers give their suffrages or votes, beginning at the *puisse* or lowest baron, and so of the rest, each answering separately "content" or "not content." In the house of commons they vote by yeas and nays altogether, and if the yeas or nays be doubtful, the house divides. If the question be the bringing in a bill or petition, then the ayes go out; but if it is on any bill before the house, then the noes go out. In all divisions, the speaker appoints four tellers, two of each opinion, who, after they have told those within, place themselves in the passage betwixt the bar and the door of the house, and tell the others who went out as they enter, and who till then are not permitted to come in: afterwards the two tellers who have the majority take the right hand, and placing themselves within the bar, all the four make their reverences, as they advance, three times, and then deliver the numbers at the table, saying, the ayes that went out are so many, the noes that stayed in so many, and *vice versa*, which the speaker repeats, and declares the majority. In a committee of the whole house, the way of dividing, is by changing sides, the ayes taking the right and the noes the left hand of the chair, in which case there are but two tellers.

If a bill pass in one house, and the other house demur to receiving it, then a conference is demanded in the Painted Chamber, where certain deputed members of each house meet, the lords sitting covered at a table, the commons standing uncovered, when the business is debated: if they do not agree, then the business is null; but if they do agree, then it is at last brought, with all the other bills which have passed both houses, to the king, who comes again wearing his crown and royal robes, and seated on the

throne, and the peers being in their robes, the clerk of the crown reads the title of each bill, and as he reads, the clerk of the parliament, according to his instructions pronounces the royal assent. If it is a public bill he says, *Le roy le veut*, which gives life and birth to that bill which was before only in embryo. If the bill be private, the answer is *Soit fait comme il est desire*. If the king refuses his assent to any bill, the answer is *Le roy s'avisera*, which is an absolute denial, but in a mild and gracious manner, and the bill is wholly null. If it be a money bill, or has subsidies for its object, he says, *Le roy remercie ses loyaux sujets, accepte leur benevolence, et aussi le veut*.

This custom of using the French language, was imposed by William the Conqueror, and has been continued ever since as a matter of form, which often subsists for ages after the real substance of things has been altered; and judge Blackstone says, it is "a badge, it must be owned, now the only one remaining, of conquest; and which one would wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force."

A bill for the king's general pardon has but one reading in either house, because they must take it as the king will please to give it.

When the business for which the parliament was summoned, has been brought to a conclusion, then the king usually adjourns, prorogues, or dissolves the parliament in the following manner:

The adjournments are always made in the house of peers, by the lord chancellor, in the king's name, to any other day which the king pleases, and also to what other place, if he thinks fit to remove them, as used formerly to be done. Every thing already debated or read in one or both houses, continues in the same state as it was in before the adjournment, to the next meeting, and so may be resumed. This is to be understood only of such adjournments as precede a recess for some time; for in all other cases, it is the undoubted privilege of each house to adjourn itself. When parliament is prorogued, the session is ended, in which case, such bills in either house as were almost ready, but had not the royal assent, must at the re-assembling of parliament, be begun anew. When notice is given to the speaker of the house of Commons, that it is the king's pleasure to adjourn the parliament, he says "This house is adjourned."

When it is the king's pleasure to prorogue or dissolve parliament, he generally comes down to the house of peers wearing his crown, and sends the black rod for the members of the house of commons to come to the bar of the house of peers, and after signifying his assent or dissent, as already described, his majesty usually makes a speech, and sometimes the lord chancellor another: then the lord chancellor, by his majesty's special command, pronounces the parliament either prorogued or dissolved. Sometimes parliament is prorogued or dissolved by commission, under the great seal, and in the same manner bills have been passed. The king



being the head of the parliament, if his death happened during its sitting, it was formerly *ipso facto* dissolved. But to prevent tumults and confusions, it has been provided by a solemn act: "that a parliament sitting or in being at the demise of the king, shall continue for six months, and if not sitting, shall meet expressly for keeping the peace of the realm and preserving the succession."

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### THE ANCIENT PARLIAMENT OF SCOTLAND.

ALTHOUGH the parliament of Scotland, by the happy union of the kingdoms, is now at an end, and the representatives of this country united to those of England, with the peers, compose the imperial parliament of Great Britain; yet when we reflect on our own independence as a free people, and upon its ancient grandeur, decency, dignity, and excellent order in transacting public affairs, it will not be unacceptable to take a brief view of it.

The late supreme court, both in dignity and in authority, was accounted the assembly of the states of the kingdom, and was called a parliament. It consisted always of three estates, the lords spiritual, the lords temporal, and the commissioners of counties, cities, and boroughs. This court was called by the king or queen-regent at pleasure, allowing a certain time for notice before their assembling. Forty days previous to meeting, the parliament was summoned by proclamation at the principal burgh of each county; after which the counties and burghs met for their elections. Every one who held lands of the crown, who in the rolls of taxations were valued at forty shillings Scots money of taxation to the king, which in real value may be about ten pounds sterling a year, or every one who had thirty three pounds six shillings and eight pence, of the present valuation, was an elector or might have been elected, if he was legally infeft or seised in the lands, and was not at the king's horn, or under an outlawry. The electors subscribed the commissions they gave, which returned their member or commissioner, as was the language of the Scottish parliament. In the case of a controverted election, the parliament judged who should serve. In the royal burgh, the common council elected the commissioner. On the first session of each parliament, the regalia, crown, sceptre, and sword of state, were brought down in state from the castle where they were kept, to Holyrood house, the coach being well attended with guards, and every passer by being obliged to be uncovered.

The following was the order of the procession in the riding of the Scottish parliament at Edinburgh, 6th May, 1703, with the number of

those who went or should have gone in the procession. The streets of the city of Edinburgh and the Canongate being cleared of all coaches and carriages, and a lane formed by railing the streets on both sides ; within which none were permitted to enter but those who formed the procession, the captains, lieutenants, and ensigns of the trained bands excepted. Without the rails, the streets westward were lined with the horse guards from the palace of Holyrood house ; after them, with the horse grenadiers ; next with the foot guards, who covered the streets up to the Netherbow, and thence to the parliament square by the city trained bands ; from the parliament square to the parliament house, by the lord high constable's guards ; and from the parliament house to the bar, by the earl marshall's guards ; the lord high constable being seated in an elbow chair at the door of the parliament house ; the officers of state having ridden up before in their robes ; and the members of parliament with their attendants, being assembled at Holyrood house, the rolls of parliament were called by the lord Register, lord Lyon, and heralds from the windows and gates of the palace, from which the procession moved to the parliament house in the following order :—

Two trumpets in coats and banners, bareheaded, riding

Two pursuivants in coats and foot mantles, riding

Sixty-three commissioners for burghs on horseback,  
covered, two and two, each having a lacquey  
attending on foot, the odd member  
walking alone.

Seventy-seven commissioners for shires on horseback,  
covered, two and two,

each having two lacqueys attending on foot.

Fifty-one lords, barons, in their robes, riding  
two and two

each having a gentleman to support his train and three

lacqueys on foot, wearing above their liveries velvet

surtouts, with the arms of their respective lords

on the breast and back, embossed on plate

or embroidered with gold and silver ;

Nineteen viscounts as the former.

Sixty earls as the former, four lacqueys attending on each ;

Four trumpets, two and two ;

Four pursuivants, two and two ;

And sixty heralds, two and two, bareheaded.

Lord Lyon king at arms, in his coat, robe, chain, baton,  
and foot mantle

Three Maces.

Sword of State,  
borne by the earl of Mar ;

The sceptre,  
by the earl of Crawford.

Three Maces.

THE CROWN,

By the earl of Forfar in room of the marquis of Douglas.

The purse, by commission of the  
earl of Morton.

## THE DUKE OF QUEENSBERRY, LORD HIGH COMMISSIONER,

with his servants, pages,  
and footmen.

Four Dukes, two and two ;  
Gentlemen bearing their trains,  
and each having eight lacqueys ;

Six marquisses,  
each having six lacqueys ;

The duke of Argyle ;  
Captain of the horse guards ;  
The horse guards.

The lord high commissioner, was received by the lord high constable, and by him conducted to the earl marshal, between whom his grace, ushered by the lord high chancellor, was conveyed to the throne.

Before the abolition of episcopacy the two archbishops and the other bishops walked in this procession, as the first estate of the parliament. The archbishops had each eight footmen, and every other bishop three ; and if they pleased might have each a gentleman to hold up his train. The great officers of state rode up from the palace in their robes about half an hour before the procession, attended by their friends on horseback, waiting in the parliament house. When the king was present, the lord chancellor received his majesty at the door of the house, and conducted him to the throne. All the members were obliged to wait on the high commissioner in the great hall, the noblemen being in their robes. They returned to the palace in the same order they came, only the constable and marshal rode on the commissioner's right and left hand, in permission caps : the lord chancellor and lord privy seal remained till all were departed, and then returned to the palace in the same state they came to the parliament house. When the king or queen rode in person, the lord chancellor rode carrying the great seal ; but not before a commissioner. When the king or queen regnant was present, the marquises and dukes rode after the earls ; but if his majesty's commissioner was present, they followed him at some distance on his right or left hand. After the king or his commissioner was received by the lord chancellor, he was seated on a throne six steps high with a canopy of state over it. On the first step under him the lord chancellor sat on a bench with the other officers of state on both sides of him. On the next step under him sat the lords of session or judges. On the right hand of the throne the bishops sat, rising up in two rows of benches : the archbishops sat on the two highest, and the bishops on the lower according to the dignity of their sees or the dates of their consecration. On the left of the throne was another great bench of three steps, and as many rows of benches on which the nobility sat according to their precedence. In the middle of the four were two tables, upon one of which the regalia were deposited ; and then beside them in two great chairs the constable and marshal sat : at the other table the lord

clerk register sat, with his deputy clerks, who were the clerks of parliament.

There were also benches placed on the floor: on those on the right sat the commissioners of shires, and on the left the commissioners of burghs. After all the members had taken their seats in the order just named, the parliament was fenced in the king's name; then the king, if present, or if not, his commissioner, and afterwards the chancellor more copiously, declared the cause for which they were called together; which being concluded, the lords spiritual (that is, the bishops) retired apart and chose eight of the lords temporal; the lords temporal likewise chose as many of the lords spiritual: these altogether nominated eight barons, and as many commissioners of burghs, which made in all thirty-two, who were called **THE LORDS OF THE ARTICLES**, and with the chancellor, treasurer, privy-seal, the king's secretary, &c., admitted or rejected all matters proposed to the states after they had been first proposed to the king. After the bills were approved by the whole assembly of the states, those that passed by a majority of votes were presented to the king, who by touching them with his sceptre declared his confirmation of them; whereas, if he refused them, they were of no force. The members gave their votes distinctly in these words, *I approve* or *not approve*; only those who were not satisfied either way, answered *non liquet*: no dissents or protests were allowed to public acts; but in private acts relative to men's rights and properties, any one might have protested for his interest. When all business was ended, the king, or his commissioner, made a speech, and the parliament was adjourned or dissolved, for there was no such thing as a prorogation in Scotland.

From the Revolution to the Union, the nobility with the commissioners of shires and burghs, composed a parliament without the bishops, and in queen Anne's time, the committee of the lords of the articles was abolished by act of parliament. So that all the members of the house had the liberty of making and debating proposals.

**CONVENTIONS OF THE ESTATES.**—Before the union there was another meeting of the three estates in Scotland, known by the name of the **CONVENTION OF ESTATES**, which was indicted by the king on twenty days' notice; the members were chosen in the same way and their proceedings were the same as those of the parliament. The king was either present at that meeting, or sent his commissioner, who enjoyed the same dignity and respect as the commissioner to parliament; but at the opening of a convention, there was no riding or cavalcade as at a parliament. The difference betwixt a convention and a parliament consisted chiefly in this: that parliament could both make laws and impose taxes; whereas, the convention of estates could only impose taxations, and make statutes for their collection, but could not make laws; and those statutes of the convention of estates were published in the same manner as acts of parliament. The

learned Sir George Mackenzie in his Institutions says, that by the records of the conventions it appears, that of old the conventions of estates consisted of any of the three estates summarily called off the streets by the king ; and that they cried down or up money, and judged processes, which of later times they could not. These conventions were not called frequently ; for the goodness and justice of the kings of Scotland were such, that they seldom required money from their subjects by imposing taxations, without giving them also an opportunity of redressing their grievances, and of making new laws for the weal and safety of the kingdom.\*

## OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

As municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong, being in every Christian country based on the absolute rule of our obedience—THE TEN COMMANDMENTS,—it follows, that the primary and principal objects of the law are RIGHTS and WRONGS.

Rights are either, *first*, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons* ; or, *secondly*, they are such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum*, or the *rights of things*. Wrongs are also divisible into *first*, *private wrongs*, which being an infringement merely of particular rights, concern individuals only, and are called civil injuries ; and *secondly*, *public wrongs*, which being a branch of general and public rights, affect the whole community, and are called crimes and misdemeanors.

RIGHTS may be reduced to three principal or primary articles,—the right of personal security, the right of personal liberty, and the right of private property ; because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these inviolate, may justly be said to include the preservation of our civil immunities, in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right (at least as far as his fellow creatures are concerned) inherent by nature in every individual ; and it begins, in the contemplation of the law, as soon as an infant is born, or

\* Blackstone's Commentaries ; Chamberlayne's *Magna Britanniae Notitia*, or present state of Great Britain.

even before its birth ; for, even whilst still in the womb, an infant is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it : it may have a guardian assigned to it ; and it is enabled to have an estate limited to its use, and take afterwards by such limitation as if it were then actually born.

2. Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem, is prevailed upon to execute a deed or do any legal act, these, though accompanied by all the other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance ; and the same is also a sufficient excuse for the commission of any misdemeanors. No suitable atonement can be made for the loss of life or limb ; and the law not only regards life and member, and protects every man in their enjoyment, but also furnishes him with every thing necessary for their support ; for there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, and detailed in another part of this work.

3. Besides those limbs and members that may be necessary to a man, for his own defence or his enemy's annoyance, the rest of his person or body is also entitled, by the same natural right, to security from the corporeal insults of menaces, assaults, beating, and wounding, though such insults do not amount to the destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it ; and,

5. The security of his reputation or good name from the arts of detraction and slander, are also rights to which every man is entitled, by reason and natural justice ; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclinations may direct, without imprisonment or restraint, unless by due course of law.

Personal confinement, in any way, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. But if a man be lawfully imprisoned, this is no *duress of imprisonment*. To make imprisonment lawful, it must either be by process from the courts

of judicature, or by warrant from some legal officer, having authority to commit to prison ; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of his commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to remain in his own country, so long as he pleases, and not to be driven from it, unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ, *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without license. The law in this respect is so benignly and liberally construed for the subject's benefit, that, though *within* the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon public service, excepting soldiers and sailors, the nature of whose employment necessarily implies an exception ; he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without control or diminution, save only by the laws of the land. The great Charter, already detailed, has declared, that no freeman shall be disseised nor divested of his freehold, nor of his liberties, nor free customs, but by the judgment of his peers, or by the law of the land.

So great respect does the law of the land pay to private property, that it will not authorise the least violation of it ; no, not even for the general good of the whole community. If a new road, for instance, were to be made through a private person's grounds, although it might perhaps be extensively beneficial to the public, yet the law permits no man, or set of men, to do this without the owner of the land's consent. In this and similar cases, the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel ? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. And even this is an exertion of power, in which the legislature indulges with caution, and which nothing but the legislature can perform.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, (for the law is a dead letter till it is pronounced by the lips of a judge lawfully appointed to administer it,) if the Constitution had provided no other method to secure their actual enjoyment. It has,

therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and personal property.

1. The constitution, powers, and privileges of parliament, of which we have already treated at large in a preceding article.

2. The limitation of the king's prerogative, by bounds of his own concession, so certain and notorious, that it is impossible he should either mistake or legally exceed them.

3. A third subordinate right of every Englishman is, that of applying to the Courts of Justice for redress of injuries. Since, in England, the law is the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.

4. If any uncommon injury, or infringement of the rights before mentioned, should happen, which the ordinary course of law is too defective to reach, there still remains another subordinate right, appertaining to every individual—the right of petitioning the king, or either house of Parliament, for the redress of grievances. Care only must be taken lest, under the pretence of petitioning, the subject be guilty of any riot, or tumult, as happened in the memorable parliament in 1640; and, to prevent this, it is provided by the statute 13th Car. II., that no petition to the king or either house of Parliament, for any alteration in the church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; and in London, by the lord mayor, alderman, and common council; nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1st W. and M., that the subject hath a right to petition, and that all commitments and prosecutions for such petitioning are illegal.\*

5. The fifth and last auxiliary right of the subject is, that of having arms for a man's defence, suitable to his condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1st W. and M., and, indeed, it is a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of societies and laws are found insufficient to restrain the violence of oppression.

In these several articles consists British rights or liberties, liberties more generally talked of than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness, on the one hand, or a pusillanimous indifference on the other.†

\* See Bill of Rights.

† Blackstone's Commentaries.



## OF THE KING'S ROYAL FAMILY.

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is the Queen.

The Queen of England is either queen *regnant*, queen *consort*, or queen *dowager*. The queen *regent*, *regnant*, or *sovereign*, is she who holds the crown in her own right ; but the queen *consort* is the wife of the reigning king, and she, by virtue of her marriage, is participant of divers prerogatives above other women.

And, *first*, she is a public person, exempt and distinct from the king ; and is not, like other married women, so closely connected as to have lost all legal or separate existence, so long as the marriage continues ; for the queen has ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord, which no other married woman can do. She is also capable of taking a grant from the king, which no other wife is from her husband. The queen of England has separate courts and officers distinct from the king, not only in matters of ceremony, but even of law ; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will. In short, in all legal proceedings she is looked upon as a *femme sole*, and not as a married woman.

The queen has also many exceptions and minute prerogatives. For instance, she pays no toll, nor is she liable to any amercement in any court. But in general, unless when the law has expressly declared her exempted, she is upon the same footing with other subjects ; being to all intents and purposes the king's subject, and not his equal. She has also some pecuniary advantages which form her a distinct revenue.

But although the queen consort is in all respects a subject, yet in point of security of her life and person, she is put on the same footing with the king. It is equally treason to compass or imagine the death of our lady the king's companion, as of the king himself ; and to violate or defile the queen consort amounts to the same high crime ; as well in the person committing the fact, as in the queen herself, if consenting. If, however, the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament. (25 Edward III.)

The husband of a queen regnant, as prince George of Denmark was to queen Anne, is her subject, and may be guilty of high treason against her :

but in the instance of conjugal infidelity, he is not subject to the same penal retributions.

A queen dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or violate her chastity, for the same reason as was before alleged. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special license from the king, on pain of forfeiting her land and goods. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is. A queen dowager, when married again to a subject, doth not lose her regal dignity, as dowager peeresses do their peerage when they marry commoners. Catharine, queen dowager of Henry V. married Owen Tudor, a private gentleman; and yet maintained an action against the bishop of Carlisle, by the name of Catharine, queen of England.

The prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or the king's eldest daughter, are likewise peculiarly regarded by the laws. For by statute 25 Edward. III., to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason, as to conspire the death of the king, or to violate the chastity of the queen. The heir apparent to the crown is usually made prince of Wales and earl of Chester, by special creation and investiture; but being the king's eldest son, he is by inheritance duke of Cornwall, without any new creation.

The rest of the royal family may be considered in two different lights, according to the different senses in which the term *royal family* is used. The larger sense, includes all those who are by any possibility inheritable to the crown, which since the revolution and act of settlement, means the protestant issue of the princess Sophia. The more confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom therefore the law pays an extraordinary regard and respect: but after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer line.

And now by statute 12 Geo. III. no descendant of the body of Geo. II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony without the king's previous consent signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may, after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage.

The royal family is subject to pay taxes, unless they are expressly ex-

empted, which in every tax bill is always done. But the peculiar privileges of the royal family are greatly counterbalanced by the legal restraints laid upon their marriages.

The queen was anciently entitled to certain perquisites, called the queen's gold, to purchase oil, as it was quaintly said, and attire for her person. Another of the queen's perquisites was formerly the right to the half of any whale found on the coast, which was for that reason called a royal fish. The head belonged to the king and the tail to the queen; and the reason assigned by old writers for this whimsical division was "to furnish the queen's wardrobe." But of late years these rights have not been exacted.\*

## OF THE KING.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power.

"The grand fundamental maxim," says Blackstone, "upon which the *jus coronæ*, or right of succession to the throne of these kingdoms depends, I take to be this: 'that the crown is by common law and constitutional custom, hereditary, but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary.'"

1. First, it is *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feudal path of descents, chalked out by the common law in the succession to landed estates; yet with some material exceptions. Like estates; the crown will descend lineally to the issue of the reigning monarch, as it did from king John to Richard II., through a regular pedigree of six lineal generations, and from George II. to his grandson George III. As in common descents, the preference of males to females, and the rights of primogeniture among the males, are strictly adhered to. Like lands or tenements, the crown, on failure of the male line, descends to the issue female. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue, and not as in

\* Blackstone's Commentaries.

common inheritances, to all the daughters at once ; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect ; and therefore queen Mary, on the death of her brother, succeeded to the crown alone, and not in partnership with her sister Elizabeth. Lastly, on the failure of lineal descendants, the crown descends to the next collateral relations of the last king ; provided they are lineally descended from the blood royal, that is, from the royal stock which originally acquired the crown.

3. It is unquestionably in the breast of the king, with the advice of both houses of parliament, to change the succession ; and by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else.

4. But however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity ; though in common with other men, he is subject to mortality in his natural body ; because immediately on the natural death of Henry, George, or William, the king survives in his successor. For the right of the crown vests *eo instante*, upon his heir ; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no interregnum ; but, as Sir Matthew Hale observes, the right of sovereignty is fully invested in the successor by the descent of the crown. And therefore it becomes in him absolutely hereditary, unless it is otherwise ordered and determined by the rules of the limitation.

Beyond all controversy the English government has been monarchical from the remotest period of its existence. That the royal office has always been *hereditary* and not *elective*, has never been denied but by the regicides who murdered king Charles I. These violent and infatuated men asserted the inalienable right of the *people* to *elect* their supreme governor ; and soon afterwards, with great inconsistency, the crown was offered to Cromwell, by a house of commons, convened by the sole authority of the usurper. Indeed the title of Cromwell himself to the supreme power, rested merely upon the instrument of government, which was drawn up by a counsel, consisting only of his general officers. What share the *people* had in proposing to make him a king, may be seen in the histories of that time.

In 1656 Cromwell summoned a parliament, when, not trusting to the good will of the people, he used every art to influence the elections, which he had new-modelled, in order to fill the house with those who would be devoted to him ; but after all his precautions, he found the majority would not be favourable to his pretensions : he therefore placed a guard at the door, and no one was permitted to enter the house of commons who did

not produce a warrant from his council. This packed parliament voted a renunciation of all title in Charles Stuart or any of his family; and at length, on the motion of alderman Pack, one of the members for London, passed a bill for investing the usurper with the dignity of King.—So much then for the *choice of the people*.

The hereditary right to the crown, acknowledged by the laws of England, has obtained the general consent and an established usage; and consequently the king has the same title to the crown, that a private gentleman has to his hereditary estate. The experience of all ages has convinced every considerate man, that popular elections are unavoidably attended with great inconvenience; and that undue influence, ambition, power, and artifice, will almost always prevail over virtue and integrity. And the fact is, as we learn from history, that the election of the ancient imperial governors was universally accompanied with bloodshed and murder. The election of the kings of Poland in former days, invariably raised the bitter waters of discontent and sedition to an alarming height, from which they subsided only in proportion to the fall of the fountain from which they flowed, deluging that unhappy country with the blood of its slaughtered people. But what Englishman who has witnessed the scenes of riot and confusion, which are exhibited at the election of representatives in parliament, will not rejoice that the succession to the crown is marked out with constitutional precision; that a rule is laid down, which is uniform, universal, and permanent, and that thereby the peace and freedom of the state are preserved?

The doctrine of representation likewise prevails in the descent of the crown, as in other inheritances; thus Richard II. succeeded his grandfather Edward III. in right of his father the Black Prince, who died whilst prince of Wales, and George III. took the crown on the demise of his grandfather George II. in right of his father Frederick prince of Wales, and each to the exclusion of their uncles.

As already mentioned, the king with the advice of his parliament, has the power to defeat the hereditary right, and entail the succession in any particular line. And the reason of this is very obvious, in order to avoid the inconvenience and distress that the whole nation must experience, were an idiot or lunatic necessarily to inherit the throne; and on the other hand, to avert the miseries that must accrue to the reigning monarch at all times, were any such authority expressly confided to the people, who are liable to be influenced by caprice, and hurried on by the most ungovernable passions. Hence it is plain, that the English constitution disclaims all such political theories, as any right inherent in the people, either to choose or set aside their king. This is clear from the bill of rights, called the "Declaration of Right," in which the lords and commons consider it "as a marvellous providence and merciful goodness of God to this

nation to preserve," king William and queen Mary, "most happily to reign over us *on the throne of their ancestors*, for which from the bottom of their hearts they return the humblest thanks and praises." The two houses in the bill of rights, did not thank God that they had found a fair opportunity to assert their right to choose their own governors, much less to make an election the only lawful title to the crown, after king James II. had made the throne vacant by his abdication; but on the contrary, in order to exclude for ever the doctrine "of a right to choose our own governors," a subsequent clause of that immortal law just mentioned declares, that "the lords spiritual and temporal, and commons, do in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterity for ever; and do faithfully promise that they will stand to, maintain, and defend their said majesties, and also the limitation of the crown, herein specified and contained, to the utmost of their powers. It is very surprising that any sensible person can infer the doctrine of a right to choose our own governors from the conduct of our ancestors at the Revolution in 1688. Since, if we had possessed it before, it is clear that the English nation did at that time most solemnly renounce and abdicate it, for themselves and for all their posterity for ever.

The true spirit of our constitution, not only in its settled course, but in all its revolutions, is hereditary succession to the reigning monarch, whether he obtained the crown by law or by force. The regular inheritance of the British throne has indeed been often changed and usurped by fraud and violence, as will be seen by a short historical view of the kings of England. But the beautiful feature of hereditary succession marked the infancy of our government, bloomed in its manhood, and is indelibly engraven in the venerable wrinkles of its increasing age.

Egbert, who was the first king of England, and the last of the Saxon heptarchy, was king of the West Saxons, by a long and uninterrupted descent from his ancestors of above 300 years, and united the heptarchy in one monarchy under himself in the year 828. How his ancestors obtained their titles, it is in vain for us to inquire, since there are no documents in existence that will satisfy such political curiosity. However, Egbert became sole monarch of England, partly by the consent of, and partly by the conquest over, the other six kingdoms of the heptarchy.

From Egbert the crown descended regularly for two hundred years, through a succession of fifteen princes, to the death of Edmund Ironside, without deviation or interruption; except that the sons of king Ethelwolf succeeded to each other, without regard to the children of the elder branches; and also that king Edred, the uncle of Edwy, reigned about nine years during the minority of Edwy, on account of the troubles of the times, but when of age Edwy assumed the reins of government himself.

At the death of Edmund Ironside, Canute, king of Denmark, obtained

the kingdom by violence, by which means a new family were in possession of the throne. Three of his heirs succeeded to the throne; and on the death of Hardicanute, the ancient Saxon line was restored in Edward the Confessor, who was the next of kin then in England. On Edward's decease, Harold II. usurped the government, for Edgar Atheling, the grandson of Ironside, was the lawful heir. Harold being defeated at the battle of Hastings, was dispossessed of the throne by William the Conqueror. Edgar Atheling, the true heir, retired to Scotland, and Malcom the Scottish king married his sister Margaret, who for her piety is commonly called Saint Margaret, whose descendant James I. restored to England her ancient Saxon line. Robert, the Conqueror's eldest son, being duke of Normandy by his father's will, was kept out of the possession of the crown of England by the arts and violence of his brothers, William II. and Henry I., who succeeded their father.

Henry I.'s real heiress was his daughter, the empress Maud or Matilda; but Stephen usurped the throne, having only the feeble title of being the Conqueror's grandson by his mother's side; Henry II. succeeded Stephen; he was the Conqueror's undoubted heir after his mother Matilda, and was also lineally descended from Edmund Ironside, the last of the Saxon hereditary kings. Henry was succeeded by Richard I., who dying childless, the right of succession rested in his nephew Arthur, his next brother Geoffrey's son. But John, the late king's surviving brother, seized the crown, and afterwards murdered his nephew, the doctrine of representation not being then clearly understood.

Henry III., who succeeded his father, king John, had an indisputable title; for Arthur and his sister Eleanor both died without issue, and the crown descended from Henry to Richard II. in a regular succession of five generations.

Henry IV. was the son of John of Gaunt, duke of Lancaster, fourth son of Edward III.; he rebelled against Richard II. and compelled him to resign the crown. And history has hitherto accused that prince of adding murder to usurpation; but Mr Tytler in his excellent history of Scotland, has demonstrated that Richard took refuge in Scotland, and died a natural death in Stirling castle, in the chapel of which fortress the remains of that unhappy prince now lie.—*Requiescat in pace*. Henry's title, however, was not a just one; for Lionel, duke of Clarence, third son of Edward III. and John of Gaunt's elder brother, left a daughter Philippa, from whom descended the illustrious house of York, who were the true heirs of the crown. But Henry having at that time a large army at his command, asserted his defective title with effect. And it was enacted by statute 7 Henry IV. "that the inheritance of the crown and realms of England and France, and all other of the king's dominions, shall be *set and remain* in the person of our sovereign lord the king, and

in the heirs of his body *issuing*." It is obvious, from the terms of the statute, that Henry's title appeared even at that time doubtful; and it is equally clear, that the king *de facto*, and parliament, in this instance exercised the right of changing and limiting the succession of the crown.

But "the beginning of strife is as when one letteth out waters." No man can tell, when a river breaks through its banks and rushes from its accustomed channel, what devastation it will occasion. Henry's usurpation gave rise to the contest between the houses of York and Lancaster. The latter in maintaining their possession, and the former in asserting their just right, spread desolation and misery, fire and sword, through a peaceful land for several subsequent generations. Henry was succeeded by his son and grandson Henry V. and Henry VI. In the reign of the latter pious but weak prince, the house of York asserted its dormant title; and after watering England with native blood for seven years, at length established its legitimate rights in the person of Edward IV..

In all the acts of parliament of Edward IV. wherein the Henries of the house of Lancaster were named, they are called "lately in *deed* not of *right* kings of England;" from hence first arose the distinction of a king "*de jure*" and a king "*de facto*."

On the death of Edward, the crown descended to his eldest son; Edward V., who, with his brother the duke of York, are generally believed to have been murdered in the tower, by their uncle Richard duke of Gloucester's order; after he had insinuated into the people a suspicion of the bastardy of the two young princes, and of their sister Elizabeth, to whom the crown of right devolved, on the death of her brothers. And the wicked and unnatural uncle usurped the government, under the name of Richard III. He enjoyed, however, the fruits of his villany little more than two years, when his tyranny excited Henry, earl of Richmond, to assert his title to the crown. Richard being slain in the battle of Bosworth, Richmond took possession of the crown by the style of Henry VII., although nothing could be more preposterous than his claim; for he was descended from a natural son of John of Gaunt, whose own title had been exploded. Henry, however, was recognised as king by an act of parliament in the first year of his reign. But the right of the crown was undoubtedly in Elizabeth, the daughter of Edward IV. This princess, the heiress of the royal house of York, Henry married in the year 1486, and thus happily settled the fierce and bloody contest, of the two rival families, commonly called the wars of the roses, from each having a rose for their cognizance, the white for Lancaster and the red for York.

How mysterious are the ways of God! How often does He overrule the wickedness and ambition of man, for the accomplishment of the greatest benefits to mankind! Had Richard conducted the affairs of government with justice and moderation, instead of exhausting the people with tyranny



and oppression, so monstrous a title as that of the earl of Richmond would never have been asserted. But having succeeded in his pretensions as the heir of the house of Lancaster, Henry married Elizabeth, who by the cruel murder of her brothers, was the undoubted heiress, not only of the illustrious house of York, but also of the Conqueror, the common royal stock.

Henry VIII. the issue of this auspicious marriage, therefore became king by a clear and indisputable hereditary right, and to him his three children succeeded in regular order. Edward VI. following his father, dying young, was succeeded by his two sisters, Mary and Elizabeth. The parliament, ever obsequious at that time to the reigning monarch, passed various acts respecting the legitimacy or illegitimacy of the birth of Henry's two daughters.

On the death of queen Elizabeth, the line of Henry VIII. became extinct; and the crown of course devolved on James VI. of Scotland and I. of England, who was the lineal descendant of Henry VII. and Elizabeth of York, whose eldest daughter, the lady Margaret, married James IV. of Scotland, so that James their grandson united in his own person an undoubted title to both the Scottish and English crowns, and was the heir both of Egbert and William the Conqueror. In James, therefore, centered all the claims of the houses of York and Lancaster; and what is more remarkable, in him, also, the ancient Saxon line was restored: he being lineally descended from Margaret Atheling, the sister of Edgar, the true heir of the throne at the conquest by William the Norman. The parliament of England, 1 James I. c. i., in recognising James' title, acknowledged his majesty, "as being lineally, justly, and lawfully, next and sole heir of the blood-royal of this nation."

James was succeeded by his only surviving son, the unfortunate Charles I., whose lawless judges had the effrontery and folly to tell that unhappy monarch, that he was an *elective* prince; and as such, accountable to his people, in his own proper person; although nothing could be more absurd and false than such a doctrine, since Charles could deduce an undeniable hereditary title for more than eight hundred years, and was unquestionably the real heir of Egbert, the first king of England. To be sure, it was very natural that men who were about to strike off the king's head, not by the sentence of the law, but with the arm of violence, should deny the constitutional inviolability of his person. Nor is it surprising, that in the commission of such a traitorous act, as putting his majesty to death, they should tell him that he was an elective, and not an hereditary king. For, with all their folly, they had discernment enough to foresee that the murder of the king would only make way for his son, if they admitted the ancient doctrine of the hereditary succession to the crown. They probably kept in mind the certainty that an hereditary successor would call them to a se-

vere account for the murder of his father. Their notions, therefore, were just as reasonable as the scepticism of those who deny the divine authority of the Bible, because they perceive that its holy doctrines condemn their ungodly practices.

The sacrilegious murder of king Charles, made way for Cromwell's usurpation, who assumed the title of Lord Protector.

After an usurpation of eleven years, a solemn parliamentary convention of the estates restored the crown to the right heir, king Charles II. In their proclamation to restore the king, the convention declared that "immediately on the death of king Charles I. his majesty Charles II. was the lineal, just, and lawful next heir of the blood-royal of this realm; and to him they most humbly and faithfully submit and oblige themselves, their heirs and posterity for ever."

During this reign a bill passed the commons to exclude the king's brother, the duke of York, from the succession, on the ground of his being a papist, but was rejected by the lords, and the king himself declared that he would never consent to it; so that on the death of Charles, the duke succeeded by the name of James II. It was on account of his religion alone that this attempt of the commons to set aside James' just right was made; it should be remembered, that there was no law in existence at that time, which limited the entail of the crown to the protestant succession. The confession of faith of the established church of Scotland says expressly, that "infidelity or difference in religion doth *not* make void the magistrate's just and legal authority, nor free the people from their due obedience to him."—*Con. of faith*, ch. xxiii. § iv.

The infatuated king James, after various and notorious attempts to change the established religion, and to set up an arbitrary government, independent on the law, voluntarily vacated the throne by abdication. But our ancestors very prudently voted in both houses of parliament, that king James' misconduct amounted only to an *endeavour* to subvert the constitution. Thus by simply declaring the throne vacant, it was filled by the nearest in proximity of blood to the late king, which was his eldest daughter Mary, with whom was associated her husband the prince of Orange, by the title of William III. and Mary II. Both houses of the convention parliament issued the following declaration, dated 12th Feb. 1688, "that William and Mary, prince and princess of Orange, be, and be declared king and queen, to hold the crown and royal dignity during their lives, and the life of the survivor of them; and after their deceases, the said crown and royal dignity to be to the heirs of the body of the said princess, and for default of such issue, to the princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of the said prince of Orange."

Towards the end of the reign of William, the duke of Gloucester, the

son of the princess Anne, dying, and with him all hopes of a protestant succession in the right line failed; William, by the advice of parliament, had previously enacted, that no person professing the faith of the Latin church should ever be capable of inheriting, possessing, or enjoying the crown of these realms. In this dilemma, therefore, the entail of the crown expectant on the death of William and queen Anne without issue, was settled by statute 12 and 13 William III. c. ii., on the princess Sophia, dowager Electress of Hanover, and grand-daughter of king James I., and on the heirs of her body, *being protestants*.

On the death of the prince of Orange, queen Anne succeeded to the imperial crown, who died without issue, but surviving the princess Sophia of Hanover, the crown descended to her son and heir George I.; to him succeeded his son George II.; on whose demise, George III. succeeded in right of his father Frederic, prince of Wales: after a long and glorious reign, he was succeeded by his son George IV., who dying without issue, transmitted the crown to his second brother the duke of Clarence, our present sovereign, whom may God long preserve. The heiress presumptive is the princess Victoria, daughter of his late royal highness the duke of Kent, fourth son of George III.

Upon the whole view of this subject, it may be clearly seen, that the title to the crown is *hereditary*, though not altogether so absolutely so as formerly; because previous to the Revolution, the crown descended to the next heir, without any restriction; but since that event the descent is conditional, being limited to such heirs only of the body of the princess Sophia, as are *protestant* members of the church of England, and are *married* to none but *protestants*. From several changes in the line of succession, different common stocks have been thereby created. The first common royal stock was that of king Egbert; after him was William the Conqueror; afterwards these two common stocks were united in the person of James I., which continued till the death of queen Anne; and now the common stock is the princess Sophia of Hanover.

The statute 6 Anne made it penal to dispute the constitutional power of the king with the advice of parliament to alter the succession: it is enacted "that if any person, maliciously, advisedly, and directly shall maintain by writing or printing, that the kings of this realm, with the authority of parliament, are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintain the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*."

It is not to be imagined that king James II. destroyed the monarchy when he abdicated the throne, and thus dissolved the constitution; for although a king may abdicate for his own person, he cannot abdicate for the monarchy, any more than the house of lords or house of commons can

renounce each its share of legislative authority. Neither was the placing of the prince of Orange upon the throne, making the monarchy elective. The necessity of the case obliged the convention to fix the crown somewhere: but they adhered to old constitutional principles, and enacted the *succession* of the crown; so that they did not change the substance, but regulated the mode of succession, and described the persons who should inherit the crown for ever. The monarchy, therefore, is as purely hereditary *now* as it ever was.

The real fact, then, with regard to the constitution, both in its settled course and in all its revolutions, has ever been, and still is this; that whoever came into possession of the crown, or however he came by it, whether by law or by force, the hereditary succession invariably continued.

It is worthy of observation, how carefully and delicately the convention parliament in 1688 disclaimed the assumption of any such abstract right as the people of England electing their sovereign, although the preamble to the Bill of Rights expressly declares, "that the lords spiritual and temporal, and commons assembled at Westminster, lawfully, fully, and freely represent all the estates of this realm." In the statute of W. and M., the parliament prays the king and queen, "that it may be declared and enacted, that all and singular the rights and liberties, asserted and declared, are the true, ancient, and indubitable rights and liberties of the people of this kingdom."

And in all the various changes of the succession to the crown, it has been the uniform policy of our legislators, to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity. By this means, our constitution preserves a unity in so great a diversity of its parts. We have an hereditary crown, an hereditary peerage, and a house of commons, and a people inheriting privileges, franchises, and liberties, from a long line of ancestors. And the chief excellency of the hereditary right of the kings of England is, that it is closely interwoven with those liberties that are equally the inheritance of the subject.\*

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## ORIGIN AND DESCENT OF THE ROYAL FAMILY OF SCOTLAND.

HAVING given an historical account of the descent of the crown in England, from the consolidation of the heptarchy into one monarchy, under

\* Blackstone's Commentaries,—Custance on the Constitution.

Egbert ; it may be interesting to many of our readers to know something of that illustrious house which swayed the sceptre of Scotland during its independence as a separate kingdom, which gave a sovereign to her more powerful rival, and the blood of whose stock circulates at this moment in the veins of almost every crowned head in Europe.

I shall not attempt to explore the regions of romance to trace the origin of the royal family of Scotland, which is said by Buchanan to have existed three hundred years before the incarnation of our blessed Saviour, the first of whom was Fergus the son of Ferquhard, a king of Ireland. There is a tradition, that a king named Hiber came from Egypt and settled in Spain ; from thence he passed over into Ireland. This monarch brought from Egypt a marble stone on which he was accustomed to sit ; which stone has ever since been used at the coronation of the Scottish sovereigns, from the time of Fergus to the time of John Baliol, when Edward I. of England carried it off among the *spolia opima* of the kingdom, being influenced by an old traditionary legend engraven on the stone itself :

NI fallat fatum, Scoti quocunque locatum  
Invenient lapidem, regnare tenentur ibidem.

Fergus assumed the rampant lion as his arms, and which has been the royal arms ever since. From this courageous prince, historians enumerate twenty-five kings, who were idolaters, previous to Donald I., who was the first Christian prince in Scotland. From Donald to Achaius there were thirty-seven kings successively. In the year 809, Achaius entered into "league and alliance offensive and defensive, towards all and against all kings and princes, not excepting any, with king Charlemagne and the most Christian kings of France his successors to perpetuity." From Achaius to Malcolm Canmore there were a succession of twenty kings. Malcolm III. began his reign in the year 1061. He married Margaret, daughter of Edgar Atheling, the true heir in the Saxon line to the crown of England,—a princess of great beauty and many accomplishments ; by this happy marriage the foundation was laid for the present consolidation of the three kingdoms under one crown ; and through a long and illustrious posterity, their descendants succeeded by right of blood to the crown, of which saint Margaret's father was dispossessed by the Norman Conqueror, and restored to England the true line of her Saxon monarchs. Malcolm III. with his eldest son Edward, were slain before Alnwick castle. He was succeeded successively by his three sons, Edgar, Alexander I. and David I. His eldest daughter Matilda, commonly called Maud, married Henry I. or *Beauclerc*, of England ; from whom descended the kings of England. Malcolm was succeeded immediately by his brother Donald VI. who usurped the crown on account of his nephew's youth. Duncan, bastard of the late king, dethroned him and seized the crown. Donald fled to the Hebrides ; but contriving to murder Duncan, resumed the reins of government. He reigned

so tyrannically, that the nobility recalled Edgar, third son, but the eldest surviving, of the late king Malcolm ; who being assisted by William Rufus, recovered his inheritance and shut Donald up in prison, where he died. This prince was the first in Scotland who was anointed with consecrated oil. His mother St Margaret obtained this favour from pope Urban II. In those days no public change or affair of importance could be undertaken without the pope's consent. He died in 1109, and was succeeded by his brother Alexander I., called the Strong, who died without issue, after a peaceful reign of seventeen years, in 1126. To him succeeded his brother David I. who married Matilda, daughter and sole heiress of the earl of Cumberland, Northumberland, and Huntingdon : by this alliance these earldoms fell to the crown of Scotland, under homage to that of England. By the countess of Huntingdon he had issue only one son, Henry, who died during his father's lifetime, but who left three sons, Malcolm, William, and David ; and three daughters, Adama, Margaret, and Matilda. After a reign of twenty-nine years, David I. died in 1151, and was succeeded by his grandson Malcolm IV., surnamed the Maiden from his chastity ; and never having been married, he died in 1163, and was succeeded by his brother, William the Lion, who died in 1214, and was succeeded by his son Alexander II. At the age of nine years, he married Joane, daughter of Richard I. of England, by whom he had no issue ; after her death he married Mary, daughter of the earl of Gowry, by whom he had one son. This king reigned thirty-five years, and died in 1249 ; his son Alexander III. mounted the throne, and married Margaret of England, daughter of Henry III., by whom he had two sons and one daughter ; the sons, Alexander and David, died during their father's lifetime. Margaret of Scotland, his daughter, married the king of Norway, and had issue one daughter, commonly called the Maid of Norway, who was declared successor to the crown. Alexander III., a wise and valiant prince, died in 1283, leaving the crown to this infant. On his death a regency was formed and the Maid of Norway brought home, but she sickened and died, and left the kingdom a prey to almost the greatest calamity that can befall a kingdom, especially in a rude and warlike age—a disputed succession.

As we before noticed, the earldom of Huntingdon was brought to the crown of Scotland by the marriage of David I. to Matilda, countess in her own right of Huntingdon, whose only son, Henry, prince of Scotland, dying before his father, his two sons, Malcolm and William, succeeded to the throne, of whom the line failed in the person of Alexander III. David, the youngest son of Henry, became earl of Huntingdon, and left two daughters, Margaret and Isabella of Huntingdon. Margaret the eldest daughter, married John Baliol, earl of Galloway, whose son without doubt was the true heir to the crown ; Isabella of Huntingdon married Robert Bruce, earl of Carrick, had a son also of the same name, Robert Bruce, who again had the celebrated Robert the Bruce, lord of Annandale, who

being grandson of the *youngest*, pretended to have a precedency to his cousin, John Baliol, who was the son of the *eldest* daughter. Besides these two, there were other ten competitors for the crown. Unhappily for the peace and tranquillity of the nation, the competitors agreed to submit their claims to the arbitration of Edward I. of England, at whose mercy the Scottish nation was now laid prostrate; Edward summoned the barons of the north of England, amongst whom were Baliol and Bruce, with all the Scottish clergy and nobility to meet him at Norham castle in Northumberland, where Edward openly asserted his supremacy over the crown of Scotland as lord paramount. The candidates were mute with astonishment at this unexpected usurpation; at length one more courageous than the rest, replied "that concerning this claim of feudal supremacy over Scotland, no determination could be made; while the throne was vacant." Edward was not of a temper to bear this procrastination, and sternly answered, "by holy Edward whose crown I wear, I will vindicate my just rights, or perish in the attempt." A day, however, was granted for consultation, which was extended to three weeks, as the candidates could not come to any agreement. Over-awed by his power or won by his bribes, the competitors, to their eternal disgrace, recognised Edward I. as lord paramount of Scotland. The umpire decided in favour of John Baliol, who swore fealty to Edward, and was crowned at Scone in the year 1292. John was compelled to do homage to Edward, and to answer to appellants in the courts at London, and there not by his advocate, but in person! Notwithstanding the humiliating degradation in which Edward held the Scottish king, the latter seems to have governed the kingdom with great prudence, and moderation; but indignant at the insults daily offered to himself and the independence of his kingdom, John renounced his allegiance and declared war against England. Edward defeated Baliol and took military possession of the kingdom, sent him and his son Edward prisoners into England, and declared the crown forfeited to its lord paramount in the year 1296. After a long protracted and gallant warfare, Robert the Bruce gained the decisive battle of Bannockburn; and thereby seated himself securely on the Scottish throne. The battle was fought on the 24th June, 1314, and for ever vindicated the independence of the kingdom. On the 26th April, 1315, parliament assembled at Ayr, and solemnly recognised Robert's title to the crown, and swore allegiance to him and his heirs; and to prevent the horrible calamities which the late disputed succession had occasioned to the country, they settled the order of the descent of the crown. Robert married first, Isabella, daughter of Donald, earl of Marr, by whom he had a daughter, Marjory, who married Walter Stewart, and "by that knot" brought the crown into that illustrious family. His second wife was Elizabeth, daughter of Aymer de Burgh, earl of Ulster, by whom he had three daughters, Margaret, Matilda, and Elizabeth; and one son, David, by whom he was

succeeded. The succession as settled at the parliament at Ayr was to run in David and his heirs, and failing him, prince Edward Bruce, king Robert's brother, and the heirs male of his body,—he died without issue, before the king,—failing these, Marjory Bruce, married to Walter great steward of Scotland, and her heirs, whether male or female. In 1329, David II. succeeded to the throne; he married Jane of England, daughter of Edward III., by whom he had no issue; at her death he married Margaret Logie, daughter of Sir John Logie, by whom he had no issue. He died 22nd February, 1371; and was succeeded by his nephew Robert Stewart, son of his eldest sister Marjory, according to the order of the succession settled by Robert Bruce and the three estates of parliament.

Before continuing the descent of the crown, we will give a brief account of the origin of the illustrious house of Stewart. Banquo and his son Fleance, mentioned by Shakspeare in his tragedy of Macbeth, were powerful thanes of Lochaber, and “bore their faculties so meekly,” and conducted themselves with such prudence and public virtue, that they rose to considerable eminence in the reign of “the gracious Duncan:” after whose murder, and the usurpation of Macbeth, that cruel and crafty tyrant planned the murder of them both; he succeeded in cutting off the father, but Fleance escaped and took refuge in England, and afterwards in Wales, where he married the prince's daughter: unfortunately the name of this prince is not given. By this Welsh princess he had a son named Walter, surnamed Banquo. This Walter returned into Scotland on the downfall of Macbeth, and the restoration of the right line, “and fought valiantly for his king against the island rebels and the savages of Scotland.” In recompense for his extraordinary services, he was created great steward, and treasurer of the royal household. In which capacity, he served the crown with so much fidelity and integrity, that the surname of Stewart was bestowed upon him and all his posterity: he was also exalted to the rank of an earl. His son and successor, Allan Stewart, went to the holy land under the duke of Lorraine and Robert duke of Normandy, son of William the Conqueror. He was succeeded by his son Alexander Stewart, whose son Walter Stewart divided the family into two distinct branches, in the persons of his two sons, Alexander and Robert Stewart.

Robert, the youngest son, married the heiress of Crookston, from whom are descended the ancient earls and dukes of Lennox, and the barons of Darnley. Of Alexander, the eldest son, descended John and James Stewart, of whom descended the earls of Athol and Buchan, Inverness, and others. Athol bore the full arms of Banquo, the patriarch of the family.

John Stewart, the eldest son of Alexander, the second of the name, left but one daughter, Jane Stewart, who married the earl of Bute; and of this marriage sprang Walter Stewart, third of the name, who married Marjory Bruce, daughter of Robert I. Marjory died before her father; but her son



Robert Stewart succeeded to the crown by the title of Robert II., on the demise of David Bruce without issue of either sex.

Many circumstances conspired to augur prosperity to Robert II.'s reign. The family of Baliol relinquished their just pretensions to the throne; Edward the III. was old, and indifferent about resuming his pretensions to the supremacy usurped by his grandfather over the crown of Scotland; Robert himself was in the full vigour of his age at the period of his accession, and the father of a numerous family. While a subject and steward of the kingdom, Robert received a papal dispensation to enable him to espouse Elizabeth the daughter of Adam Muir of Rowallan; and by her he had four sons, John, Walter, Robert, and Alexander, and several daughters. Elizabeth his wife died before his accession, and he married Euphemia Ross, daughter of the earl of Ross, by whom he had two sons, David and Walter, and a daughter, whom he bestowed after his accession on a son of the earl of Douglas. Robert II. and his queen Euphemia, were crowned at Scone by the bishop of Aberdeen, in the year 1372. Old age and bodily infirmities rendered Robert II. unequal to the cares of government, and prince John, his eldest son, being lame, in consequence of a kick on the thigh from an unruly horse, and unfit for exertion, he appointed Robert earl of Fife, whom he also created duke of Albany, regent of the kingdom, into whose hands he resigned the whole power of the state. The king died in his castle of Dundonald, in the month of April, in the year 1390, in the seventy-fifth year of his age and the nineteenth of his reign.

John, earl of Carrick, succeeded to the crown on the death of Robert II., the first of the dynasty of the Stewarts. He married Anabella Drummond, who with himself was solemnly crowned at Scone, the 15th August, 1390. On his accession, he was persuaded to adopt the name of Robert III., because the misfortunes of the house of Baliol had rendered his name odious to his subjects, and the superstition of the times induced them to think that the *name* was fatal to the kingdom. Besides, his great-grandfather, the ever-memorable and heroic Bruce, had shed a lustre round the name of Robert, which rendered that name dear to the nation. The infirmity already noticed, and a corresponding indolence, compelled Robert III. to continue the duke of Albany at the head of government. The king's eldest son Robert, duke of Rothesay, was married to a daughter of Archibald *the grim*, earl of Douglas, after having been engaged to marry a daughter of the earl of March. The guilty ambition of the duke of Albany induced him to murder his nephew, the heir apparent of the crown, which he did by the cruel and lingering death of starvation, in the castle of Falkland. Robert became alarmed for the safety of his surviving son James; he regarded Albany with abhorrence and dread, as the enemy of the lives of his children, as the murderer of his son, and yet as being too potent for punishment, or even for removal from the dangerous height

to which he had attained. His second son James was too young to guard his own life against his uncle's arts, if Albany should aspire to the crown. Trembling under these apprehensions, he secretly determined to send the young prince to the court of France, where he might prosecute his studies, and find protection in the court of a faithful ally. At the command of the king, therefore, Sinclair earl of Orkney, secretly prepared, with a suitable number of attendants, to conduct the young prince to France. They sailed, but alas ! they fell in with an English ship of war, who captured their vessel, and carried the prince with his attendants prisoners into Flamborough head, contrary to all the rules of war, for at the time a truce existed between the nations. The news of this disaster filled up the cup of his afflictions, and the good old man died of grief at his castle of Rothsay, in the isle of Bute, in 1406, and sixteenth year of his reign.

The king's death made no alteration in the government ; it was still administered by the duke of Albany as regent, and the rude nobles yielded him an outward obedience ; nevertheless, every one lived in his own castle, in a state of perfect independence. James the first still continued a prisoner in England, and Albany made no efforts to procure his release. At length, however, the regent died in the year 1419, and was buried at Dunfermline, " the sacred storehouse of his ancestors." His eldest son Mordac succeeded him as regent ; a weak man, but who made no effort to redeem his sovereign, who still continued to languish in captivity, where he might have died, but for one of those trifles which the providence of God makes subservient to his own purposes. Mordac had a favourite falcon, which his eldest son Walter, a man of violent and ungovernable temper, had often solicited his father in vain to bestow upon him. At last the ungracious youth, resolved that his father should not enjoy what he refused to his importunities, snatched the falcon from his father's wrist and wrung its neck before his eyes. This excited the most violent passion in the old man, and he instantly vowed to recall his imprisoned sovereign, in revenge of his son's insolence. The angry resolution of the regent fortunately concurred with the earnest desire of the people, who had with one accord turned their eyes toward England and their captive sovereign. An embassy was accordingly despatched into England to negotiate his release. The ministers of Henry VI. during his minority were happily well disposed to listen to proposals for James's freedom. One hundred thousand marks partly paid, and partly promised, with the security of some of the young nobility, procured his release from captivity. During his imprisonment, James himself had impressed his captors with the most favourable expectations of his talents and virtues, and persuaded them that he was cordially attached to their country, their arts and manners, and devoted to their political interests.

Before leaving England, James married Jane Beaufort, daughter of the

duke of Somerset, and in name of her dowry one half of the ransom was remitted. James and his queen were conducted to the borders of his own kingdom by cardinal Beaufort, the queen's uncle, and the earl of Somerset, her brother. He was received with transports of joy by his people. He was met at Scone by the prelates, nobles, and commons of the kingdom, who were summoned to attend a parliament, and where he was solemnly crowned by Trail, archbishop of St Andrews, and placed on the throne by his cousin the duke of Albany. James was in the twenty-seventh year of his age when he thus sat down in peace on the throne of his fathers, in the year of grace one thousand four hundred and twenty-four. By Jane Beaufort he had twin sons, born in October, 1430, Alexander and James; the former died in infancy. By her he had also six daughters. The lady Margaret of Scotland was married to the Dauphin of France, afterwards Lewis XI. Eleanor married Sigismund, archduke of Austria. The third daughter married the count of Zealand; the fourth, the duke of Bretagne; the fifth, the earl of Huntly; and the sixth, the earl of Morton. On the night of the 21st February, 1437, James was treacherously murdered while at supper, by the earl of Athol and seven other accomplices, after wounding his queen, who exposed her person to their daggers, in defence of her husband and sovereign.

James II. succeeded to the throne at the early age of seven. The estates of the kingdom appointed Sir Alexander Livingston of Callander, regent of the kingdom, and the chancellor, Sir William Crichton of Crichton, tutor to the king. In his fifteenth year, James married Mary, daughter of the duke of Guelders, by whom he had three sons; James, prince and steward of Scotland, Alexander duke of Albany, and John earl of Marr; and two daughters,—Mary, who married James Hamilton earl of Arran, and Cecilia. James espoused the side of the usurping house of Lancaster; and in prosecution of their war with the house of York, James laid siege to the castle of Roxborough, which appears to have been then in the hands of the partisans of York, and was there killed by the bursting of a cannon, a fragment of which wounded him so severely on the thigh, that he died almost immediately on the spot, in the year 1460, the thirtieth year of his age and the twenty-fourth of his reign.

James III. was only seven years of age when his father's death placed him on the throne, and plunged the kingdom into all the miseries consequent on the disputes and intrigues of rival factions. James married Margaret, daughter of Christiern king of Denmark, Sweden, and Norway; who brought with her as a marriage portion the cession, on the part of Denmark of all its claims to tribute from the crown of Scotland on account of the Hebridian isles, and to the feudal superiority of the Orkney and Shetland islands. James was more attached to the arts of peace, than was consistent in the rude notions of the period with the kingly dignity. The nation

were apt to make comparisons, disadvantageous to the character of the sovereign, between him and his brothers, Albany and Marr, which excited his jealousy ; to which horrible passion the earl of Marr fell a victim, and Albany saved himself by fortifying himself in the castle of Dunbar. He fled into France, where he married the duchess of Boulogne, by whom he had a son, who was afterwards regent of Scotland. James roused himself from his peaceful pursuits and showed that he possessed both courage and conduct. A party of his nobles rebelled against him ; and getting possession of his eldest son, prince James, they defeated the king in a desperate battle at Torwood in Stirlingshire. James fled at full speed ; and his horse, suddenly startled at some object, leapt over the Carron and threw his rider. He was carried into the miller's house of Bannockburn, and there treacherously murdered by a partisan of the rebels, who recognized the fallen monarch, on the 11th June, 1488, in the twenty-ninth year of his reign and the thirty-sixth of his age. Besides his successor, James left two sons, Alexander duke of Ross, and John earl of Marr, and one daughter.

James IV. was proclaimed at Linlithgow by the rebel army which had defeated and murdered his father ; but the barons who had been loyal to James III. mustered a new force, and carried the bloody shirt worn by the late king on the point of a spear. These were defeated with great slaughter, and the kingdom gradually submitted to the sovereignty of the young king, who at the time of his accession was in his fifteenth year, and a youth of great promise. James, assuming the title of the laird of Ballengeich, would often disguise himself in the humble garb of a beggar, or gaberlunzie man, and wander unknown through the kingdom, inquiring into the conduct of his officers, and listening to the opinions and comments of even the lowest of his people concerning the character of their king. But above all, the diversions of the tournament, that mimic representation of war, were especially agreeable to his magnificent taste, and the generous gallantry of his spirit. His fame as a chivalrous knight spread all over Europe ; and the most accomplished knights, proud to distinguish their prowess in arms, resorted to the court of Holyrood : in every knightly art James excelled almost all his contemporaries. James sent an embassy to the court of England, to solicit the hand of the princess Margaret, eldest daughter of Henry VII., which was readily bestowed, and the marriage celebrated by proxy in the cathedral of St Paul's. Henry accompanied his daughter a considerable way on her journey, the earls of Surrey and Northumberland, with a numerous train of ladies, accompanied her into Scotland. James met her in the Lammermoor ; and in a church there, the actual marriage of the parties took place : a happy marriage, which introduced an English influence into the councils of Scotland, which entirely extirpated the baneful councils of France, and was the immediate means of consolidating two nations formed by nature to be but one people. James terminated his

earthly career on the fatal field of Flodden, on the 9th September, 1513, in the thirty-ninth year of his age, and the twenty-fourth of his reign ; leaving two infant sons, James prince of Scotland, and Alexander duke of Ross who died soon after his father.

At his accession to the throne, James V. was only seventeen months old. The first effects of the terror occasioned by their defeat at Flodden, was to constitute the dowager queen Margaret regent of the kingdom, in order to propitiate the wrath of Henry VIII. Margaret, however, was young and beautiful, and surrounded by the impetuous young nobility let loose from paternal restraint by the slaughter of their fathers at the last fatal battle. Archibald Douglas, now earl of Angus, persuaded Margaret to become his wife, without consulting the estates of the kingdom, or her brother Henry. This rash step naturally excited the jealousy of the nobility, who viewed with anxious jealousy, the sudden elevation of one of their own equals to the supreme power. The party who favoured the interests of France, proposed the recall of the son of the late duke of Albany from France, and to commit the regency of the kingdom, and the tuition of its infant sovereign to his care. He arrived, and governed with a stern impartiality; but insurrections and conspiracies drove him out of the kingdom, when Margaret and her husband again acquired the reins of government; the enemies of Angus and his royal wife soon concurred in again inviting Albany to return and assume the regency. Among Angus's most implacable enemies was now his own wife, stimulated by jealousy; and besides, she herself had formed a new attachment in the person of Stewart, brother of the lord Ochiltree. On the return of Albany, she induced him to solicit for her, at the venal court of Rome, a divorce from her husband, whom she now most cordially hated. At the age of twelve years, James assumed the administration of the government, and Albany finally took his departure for France. Angus seized the person of the king, and usurped the government, from whose custody at Falkland the young king escaped, some years afterwards, and being instantly attended by those of the nobility who were loyal to his person, again assumed the government. He created his mother's husband Henry Stewart, lord of Methven. James sailed round the whole coast of his kingdom, and was the only prince who ever set foot on the Shetland islands. He went to France in quest of a bride, and there espoused Magdalene of France, daughter of Francis I., who died on the fortieth day after her arrival at Holyrood house. He married again Mary of Lorraine, daughter of Claudius of Lorraine, duke of Guise, and widow of the duke of Longueville, in the year 1530,—a lady in the prime of her years and of distinguished beauty, whom James had himself seen and admired when he visited France. Of this marriage was born prince James in 1538, and prince Arthur, born in 1540; both of whom died in one day: also Mary, born in 1542. During this king's reign the Reformation commenced, and

many horrid cruelties were practised on those who came out of the spiritual Sodom of the Romish communion. James the V. died on the 13th December, 1542, and left his kingdom to a long minority, and an infant daughter of a week old, of whose birth when he was informed on his death bed, he said, "Alas! the kingdom came with a maiden, and it will go with one;" he turned himself in his bed and never spoke again.

Mary Stewart succeeded to the throne on the seventh day of her birth, and after much intrigue the earl of Arran was chosen regent; but cardinal Beaton gaining the ascendancy in the kingdom, he induced Arran to resign in favour of the dowager, queen Mary. She had the address to gain the consent of her parliament to send her daughter Mary to France, to be educated with the view of marrying the Dauphin of France,—to the great disappointment of the court of London and the English party in Scotland, who were anxious to have espoused her to Edward VI. She married the dauphin, afterwards Francis II.; who dying without issue, she returned a widow to Scotland in the year 1561, and afterward married her own cousin, Henry Darnley. To account for their consanguinity, it will be necessary to return to the widow of James IV., the daughter of Henry VII. After king James's death she married Archibald Douglas, earl of Angus, to whom she had a daughter, lady Margaret Douglas. This lady, the niece of Henry VIII., was educated at his court, and was by him at an early age given in marriage to the earl of Lennox. This nobleman was in the next degree after the Hamiltons allied to the crown of Scotland, and at that time was an exile on account of his unsuccessful exertions to promote the interest of England. In consequence of this marriage, the children of Lennox and lady Margaret Douglas, were next after the house of Hamilton, the collateral heirs of the crown of Scotland, and next after Mary herself collateral heirs of the crown of England. The eldest son of Lennox and lady Margaret Douglas was Henry lord Darnley. He was the queen's cousin, and they were married in the chapel royal, Holyrood house, by the dean of Restalrig, on the 29th July, 1565, and the name of Henry was by proclamation associated with the queen in all the written deeds of the government. The issue of this marriage was an only son, James duke of Rothesay, who was born in Edinburgh castle on the 19th June, 1566; and in consequence of the rebellion of her subjects, was even in infancy exalted to sit upon her throne. The earls of Moray, Morton, and Bothwell, entered into a conspiracy to destroy the king consort, which they accomplished by blowing him up in the Kirk-o-field with gunpowder, on the 9th February, 1567. By the confession of all the conspirators as recorded in history, Mary is entirely and triumphantly acquitted of having had any previous knowledge, or participation in this atrocious deed. Afterwards Bothwell seized Mary's person and carried her off to his castle of Dunbar, where he first committed a rape upon her person, and next compelled her to accept himself in marriage, all the while

keeping her a close prisoner. No sooner had Bothwell's guilt been crowned with the desired success, than those very nobles who had recommended him to Mary as a proper husband, combined to overthrow his power, and having treacherously seized Mary near Musselburgh, they confined her in Lochleven castle, with the ill disguised intention of taking away her life. From thence she escaped, and her friends drawing together, fought a pitched battle with the rebels, at Langside hill, near Glasgow, under the command of the regent Moray, her bastard brother. Her forces were defeated and she herself escaped to Dundrinnan Abbey in Galloway, from whence she unhappily put herself into the power of her remorseless enemy Elizabeth, who, against all the laws of nations and humanity, kept her a close prisoner for more than eighteen years, and then cruelly murdered her by a judicial sentence and decapitation in the year 1587, in the forty-fifth year of her age, and also of her reign.

At the age of one year, James, duke of Rothsay was elevated by the rebel barons to the throne of his mother, not yet vacant, by the title of James VI. The kingdom was miserably governed by four regents till the year 1578, when Morton was disgraced, and James assumed the reins of government, and soon after Morton terminated his guilty career on the scaffold. James was chaste in his conduct, and had not disgraced his youth by any of those vices which had characterized many of his predecessors, and his people became exceedingly anxious that he should form a matrimonial alliance. A splendid embassy was accordingly despatched to the court of Denmark, and Anne the Danish monarch's second daughter was granted to his wishes. Storms however delayed the arrival of his expected bride, but impatient of delay he sailed to Denmark, and consummated his marriage. In one of his letters to chancellor Maitland he good humouredly says, "we spend our time here drinking and driving over, just as we do at hame." After spending some months there in festivity, he returned in safety and was joyfully received by his affectionate people.

Queen Elizabeth of England died on the 24th March, 1603, in the seventieth year of her age, and forty-fifth of her reign. A little before her death, the lord keeper inquired who she willed to be her successor: her answer was, "None but my cousin, the king of Scots." James was accordingly proclaimed king, first at the palace of Whitehall, and afterwards at the cross in Cheapside. On the third day after, the news was brought by Sir Robert Cary. The privy council of England, in their letter to James, acknowledged that "to his right the lineal and lawful succession of all our late sovereign's dominions doth justly and only appertain: wherein we presume to profess this much, as well for the honour, which will thereby remain to our posterity; as for your majesty's security of a peaceable possession of your kingdoms, that we had never found, either of those of the nobility, or of any other of the estates of this realm, any divid-

ed humour about the receiving and acknowledging your majesty to be the only head, that must give life to the present maimed body of this kingdom, which is so happy as with *an universal consent* to have received one sole, uniform, and constant impression of bright blood, as next of kin to our sovereign deceased, and consequently by the laws of this realm, true and next heir to her kingdoms and dominions. And rest assured, that our tender and loyal affections towards you our gracious sovereign, shall be ever hereafter seconded with all faith, obedience, and humble service, which shall be in our power to perform, for maintaining that which we have begun with the sacrifice of our lives, lands, and goods, which we with all our other means do here humbly present at your majesty's feet."

His daughter Elizabeth, born 19th August, 1596, married at London on the 14th February, 1613, Frederick, elector palatine, and king of Bohemia, by whom he had a numerous family. Her youngest daughter Sophia married Earnest Augustus, duke of Brunswick and Hanover, of whom are descended the present royal family of Great Britain.

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### THE KING'S DUTIES AND PREROGATIVES.

"THE king's name is a tower of strength;" and an apostle who wrote by inspiration, informs us, not only of the obedience due by subjects to their princes, but of the duties incumbent on princes towards their subjects; so that protection and allegiance are reciprocal duties incumbent on both the governors and the governed. "Let every soul be subject to the higher powers. For there is no power but of God; the powers that be are ordained of God. Whosoever, therefore, resisteth the power, resisteth the ordinance of God; and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same. For he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore, ye must needs be subject, not only for wrath, but also for conscience sake. For, for this cause pay ye tribute also; for they are God's ministers, attending continually on this very thing. Render therefore to all their dues; tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour." (Romans xiii.)

It is a maxim in law that protection and subjection are reciprocal. The subject owes the duties of obedience "for conscience sake:" and the king's principal duty in return is to govern the people whom God has committed to his charge, according to the known laws of the land, and to



the utmost of his power to cause law and justice to be executed in *mercy*. In the claim of Right, the coronation oath was ordained to be taken by the king or queen in the presence of all the people, who on their part, reciprocally take the oath of allegiance to the sovereign. The following is the oath as taken at the king's coronation.

*The archbishop or bishop shall say* : Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereunto belonging, according to the statutes in parliament agreed on and the laws and customs of the same ? *The king or queen shall say* : I solemnly promise so to do.

*Archbishop or bishop* : Will you to your power cause law and justice, in mercy, to be executed in all your judgments ? *King or queen* : I will.

*Archbishop or bishop*. Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law ? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do, or shall appertain unto them or any of them ? *King or queen* : All this I promise to do.

*After this the king or queen, laying his or her hand on the holy gospels shall say* : The things which I have here before promised I will perform and keep : *so HELP ME GOD, and then shall kiss the book.*

At his coronation the king does not swear to protect the establishment of Scotland, because he had done so as his very first act after his accession. The twenty-fifth article of the union expressly provides " that the sovereign in the royal government of Great Britain, shall in all time coming, at his or her accession to the throne, swear and subscribe that they shall inviolably maintain and preserve the aforesaid settlement of the true protestant religion, with the government, worship, discipline, rights, and privileges of this church of Scotland, as above established by the laws of this kingdom in prosecution of the claim of right."

The king of England is very highly exalted above his subjects ; and the constitution regards his person as so sacred, that no jurisprudence upon earth has power to coerce him. No suit even in civil matters can be brought against the king, for no court can have authority over him. The king being above the law, is not the effect of mere visionary theory or of idle superstition and folly, as many absurdly imagine. For, as already mentioned, it is the king's fiat that makes the laws by the advice of the great council of the nation, and consequently the creator must be superior to the thing created ; besides, the liberty and safety of the meanest subject is better secured by the free agency of the executive, than if the king was a mere public servant, like the president of the United States of America.

The king is declared to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon

earth, dependent on no man, accountable to no man. Judge Bracton says, "*Rex est vicarius, et minister Dei in terra : omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.*"

The king is called the father of the country, not that he begat his people, or that he must be an older man than all his subjects ; but because Adam, the first king as well as the first man, begat his own subjects, and when the eldest son succeeded to his father's authority he succeeded also to his title of father, and hence the style of father is given to this day to all kings, which points remarkably to the original of government or kingship in the time of man's innocency in Eden, which God first instituted there, both in nature and by positive command. And therefore we owe to our sovereign the same obedience which Adam's children or subjects paid to him ; for God's commands and institutions descend through all ages to the end of time, and government is of the same necessity and obligation now, as it was when it was first imposed by God himself, and it is equally "his ordinance" now, as it was then.

If government and its succession was ordained by God, then it is as natural that it should succeed in the same track, as for the sun to proceed in his diurnal course ; and consequently, when elective monarchies and republics usurp the place of "God's ordinance"—that is an hereditary monarchy or fathership—they are eccentric from, and breaches of the primitive institution ; nevertheless, obedience is due to such when a better right cannot be established, as a bastard is a man, although he be unlawfully begotten, and it would be as much murder to kill a bastard, as to kill one lawfully born ; so a republic is a government though a bastard one, and is to be obeyed till a better right to the government is established.

The king "is the minister of God for good" to his people, and consequently he is as much bound to exercise his high authority agreeably to the divine will for the benefit of his people, as they are to obey him "in all godly fear, knowing whose authority he hath," namely God's. But whilst the king is a minister for good, he is also "a revenger, to execute wrath upon him that doeth evil ;" therefore if we compare the benefits, which an obedient people derive from their governors, with the evils which a few turbulent men may suffer from the worst governors, we shall find that the general good far outweighs the particular evils beyond all comparison. For if the government is deranged, then every man's hand is let loose upon his neighbour, the strong oppress the weak, and a more general tyranny will follow, than by the greatest severity of any king. It frequently happens, that the most rigid governors are the strictest justiciaries ; and, on the other hand, kings may be so gentle and easy, as to let factions rise and distract the country, which generally occasions more mischief than the worst administration. The evil of too great clemency was exemplified in Charles I. who suffered factions to get beyond control ; and rebellious

people always denominate those princes tyrants, whom they destroy, as the ruin and bloodshed of the people always accompanies the destruction of the sovereign, whose reign is consequently called bloody and tyrannical. Hence the severe reigns of Henry VIII. and Elizabeth have been called glorious, because their severity kept down faction and preserved peace. Throughout all history, the mildest and best kings have been always most rebelled against by their subjects. But let kings be as bad as they are often called, still their tyranny must end some time; in them "life's copy's not eterne;" and to change our governors at the caprice of the mob, is not worth the expense of blood and treasure which rebellion and usurpation has always cost the nation. The usurpation of Henry IV. cost England a hundred years of carnage and civil war, and which was not composed till the royal line of York regained their inheritance. The usurpation of Cromwell cost the three kingdoms more blood and treasure than all her foreign wars from the Conquest to his time.

It is a wise maxim in English law, that "the king can do no wrong:" not that he is personally impeccable, but because he derives his authority from God alone, as the laws of England acknowledge; and, therefore, that excellent maxim means only that he is not accountable to his subjects for his public actions; but his ministers or counsellors are responsible for the advice they may give him: and under God, this is our greatest security; for if the king could be controlled or coerced, then he would be no longer *sovereign*, for whoever had the power to coerce or control him would be in fact the sovereign; but his counsellors being responsible with their lives and fortunes, are put under the necessity of giving good and just counsel. Judge Bracton says, "that the king does no wrong, neither will he amend that wrong either on petition or remonstrance;" and he decides that "*sufficit ei pro poena*, that it is sufficient punishment to him (the king,) that he is to expect God to be an avenger, for he has no superior on earth," which was Bracton's opinion of this maxim. The maladministration of the king cannot be of such mischievous effects to the people as their own anarchy; and in the case of a personal incapacity in the prince to administer the government, such as infancy, lunacy, or any other cause, the three estates of parliament appoint a regent, who governs in his name and by the authority of the incapable prince. When Uziah was struck with leprosy, so that he was cut off from all society and lived "in a several house," his eldest son Jotham "was over the king's house, judging the people of the land," but did not succeed to the crown till his father's death, (3 Chron. xxvi. 21, 23.) And after Nebuchadnezzar had been turned into a beast for seven years, when his reason was restored, "his lords and his counsellors sought unto him, and he was established in his kingdom," (Dan. iv. 36.) The line of succession was not broken, nor the people discharged from their allegiance, on account of the madness of

their prince, and it is the general supposition that the case of Nebuchadnezzar was madness. The confession of Faith of the legal church of Scotland, asserts "that difference of religion, or even infidelity, does not take away the right of a king to his crown."

The king's prerogatives are of three kinds, such as regard his royal character, his royal authority, and his royal income or revenue. The term royal dignity implies, not only those powers and emoluments which he possesses *jure coronæ*, but likewise other attributes of a transcendent nature, which elevate him above all other men, so that he has no superior upon earth. Some of these prerogatives, especially those that relate to justice and peace, are so essential to sovereignty that they are for ever inherent in the crown, and are equally inseparable from it as the sun-beams from the sun. And every British king, as he is *Debitor justitiæ* to his people, so is he in conscience, obliged to defend and maintain all the rights of the crown in possession, and to endeavour the recovery of those, of which the crown may have been stript. On the other side, it is equally his duty to protect the just liberties of his subjects, according to the golden rule of the pious Charles I. that "The king's prerogative is to defend the people's liberties, and the people's liberties to strengthen the king's prerogative."

As sovereign, he is "the Lord's anointed," "the minister of God," and as such, inferior to no man, dependent on no man, and accountable to no man on earth, as the laws fully recognise: the crown belongs to him alone, without any partners, and is under no subjection to any one. The statute of 16th Rich. II. c. 25, asserts "that the crown of England hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God, in all things touching the regality of the same crown, and to none other;"—"whereas by sundry divers old authentic histories and chronicles, it is manifestly declared and expressed that this realm of England, is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same:" 24th Hen. VIII. also 1 Eliz., then surely, to neither a foreign nor domestic tribunal; for if the pope, as he formerly claimed, had any supremacy, then the king would not be "supreme," and so there would be an end of British independence, equally as if a domestic tribunal could try, or coerce him, which would immediately put an end to the government. "Such," says an excellent writer, "was the effect of the mock trial of king Charles I. That unhappy prince, firmly, consistently, and constitutionally denied the authority of the court that condemned him. But in vain did he plead his own rights and the rights of his people, before a tribunal erected by domestic violence, which, trampling upon all laws, human and Divine, completely overturned the constitution. If, indeed, the king invade the rights of the subject, either by private

injuries, or public oppressions, the law has provided a remedy in both cases. Should any person, for instance, have any just demand on the king, in point of property, he must petition him in his court of Chancery, where his lord chancellor will administer right as a matter of grace, though not upon compulsion. So likewise in cases of ordinary public oppression, as, politically speaking, he can do no wrong, impeachments and indictments will lie against those evil councillors and wicked ministers, without whose bad advice and criminal assistance he could not misuse his power, or act in contradiction to the known laws of the land."

Another political attribute of the king is his *absolute perfection*. The ancient and fundamental maxim, "that the king can do no wrong," does not mean that he is not subject to the same passions and infirmities as other men; but that the constitution has prescribed no mode by which he can be personally amenable for any wrong that he may actually commit. And, in fact, the inviolability of the king is essentially necessary, not for his own private gratification, as the ignorant are too apt to suppose, but for the *preservation* of the liberty of his subjects. The king, like the sun, shines not so much to exhibit his own splendour, as to animate all around him. He is the centre of attraction, around which the different bodies in the political system revolve, and by whose influence they are preserved in their proper places and order. The king is not capable, politically, of even *thinking* wrong. For should he make any grant, for instance, contrary to reason, or prejudicial to the state, or to any individual, the law will not impute any blame to him, but suppose that he was misled and ill advised, and thereupon such grant is rendered void. The two houses of parliament, however, have a constitutional right of remonstrating and complaining to the king, even of those acts of royalty which are properly his own. This is often done in canvassing the messages to each house, signed by the king, and in deliberating on his speeches from the throne. Yet to preserve decency and the freedom of debate, the members usually consider these speeches and messages, as the composition of the ministers of state, and therefore have always thought themselves at liberty to examine any proposition in them with freedom. This privilege, however, of examining the personal acts of the sovereign, belongs exclusively to the two houses of parliament, and is even there to be exercised with all due respect.

In further pursuance of this principle, the law also determines that in the king there can be no negligence, and therefore no delay will bar his right: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the time limited to subjects. In the king also there can be no stain or corruption of blood; for if the heir to the crown were attained of treason or felony, and afterwards the crown should descend to him, this would *ipso facto*, purge

the attainer. Neither can the king in judgment of law, as king, ever be a minor or under age ; and, therefore, his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. The very necessity of appointing a protector, guardian, or regent, is sufficient to demonstrate the truth of that maxim of common law, that there is no minority in the king : and therefore that he hath no legal guardian.

*Perpetuity* is another kingly attribute. The *king* never dies. Because on the natural death of the sovereign the crown descends to his heir, without any interregnum or interval whatever, who becomes immediately the sovereign : and the source and fountain of all political power, throughout the kingdom, as all magistrates, and men in authority, derive their power, privileges, and authority from him. In the exercise of his royal prerogatives, the king is absolute and irresistible, and accountable to no man ; nevertheless, his advisers may be called to a severe account for their bad advice. In his intercourse with other nations, his public acts are the acts of the whole community, he being the head and chief of the nation ; whatever is done without his concurrence and authority, being mere private acts, are of no authority. He alone can empower and send ambassadors, who represent his person, and are entitled to the same courtesy and respect as himself. He alone can make treaties, leagues, and alliances with foreign powers, and these are binding on the whole nation ; his ministers, by whose advice and instrumentality he makes those treaties, being answerable for their evil counsel. The whole power of the sword is in the king alone, he alone declares war, and makes peace ; his *advisers* being still answerable for their advice.

At home his prerogative is exercised, in allowing or rejecting all acts of parliament which he considers proper or improper to be passed into a law. It is incorrect to say that the king has only a negative voice, all the negatives in the world could never make an affirmative ; it is true he seldom exercises his negative, but he always exercises an affirmative, when he consents to enact what his councillors in parliament advise him to make a law. Notwithstanding the many and important concessions of the crown to parliament, it has never conceded the power of the sword, which is wholly lodged in the king : he is generalissimo of all the naval and military array of the kingdom, and by his prerogative he raises and regulates the fleets and armies. The danger of trusting the power of the sword in the hands of parliament, was exemplified in the reign of the first Charles, and to remedy this, and annex it irrevocably to the crown, the statute 13 Ch. II. was enacted, which declares that “ Forasmuch as within all his majesty’s realms and dominions, the *sole, supreme* government, command and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever

was, the undoubted right of his majesty, and his royal predecessors, kings and queens of England, and that both or either of the houses of parliament cannot, nor ought to pretend to the same; nor can, nor lawfully may raise or levy any war, offensive or defensive, against his majesty, his heirs or lawful successors; and yet the contrary thereof hath of late years been practised, almost to the ruin and destruction of this kingdom; and, during the late usurped government, many evil and rebellious principles have been instilled into the minds of the people of this kingdom, which, unless prevented, may break forth to the disturbance of the peace and quiet thereof." (Act 13 Ch. II. c. 6.)

By his prerogative the king can erect beacons, lighthouses, and sea-marks, whenever and wherever he chooses; and if the owner of the land, or any other person, shall destroy or remove any of these, he is liable to be amerced in £100, and in failure of payment he is *ipso facto* outlawed. The king can prevent any one from leaving the kingdom, by issuing his writ under the great seal, or by commanding parties to return if abroad; disobedience to either is a high contempt of the king's prerogative, for which the offender's lands may be seized till his return; after which he is liable to fine and imprisonment.

The king is the sole judge of all his subjects, which is fully acknowledged in the statute 24 Henry VIII. c. 12., where he is called the "one supreme head and king—he being also instituted and furnished by the goodness and sufferance of Almighty God, with *plenary, whole and entire* power, pre-eminence, authority, prerogative, and jurisdiction to render and yield justice, and final determination, to all manner of folk, resiants or subjects within the realm, in *all* causes, matters, debates, and contentions," &c. But acting as a judge in his own proper person, would be both physically impossible and also derogatory to his dignity; he distributes justice, therefore, to all his subjects, through the channels of the different courts of justice in the kingdom, which are erected solely in his name, and by his authority, justice being rendered entirely in his name, under his seal, and executed by his officers alone, and by none other.

In the beginning of his long and glorious reign, George III. rendered the judges independent, in order to prevent the possibility of their being corrupted or biased in the administration of justice; he declared "that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." Accordingly he gave his consent to an act of parliament, continuing the judges in their office notwithstanding the demise of the crown; and they cannot be removed but by the joint address of both houses of parliament to the king. This is an act of concession from the crown, that cannot be too highly praised, as the perversion of justice is

thus made almost next to impossible. English courts of law are neither executive nor legislative, they are entirely *judicial*, which renders them pre-eminently conservators of the liberties of the people.

"We see then," says an excellent writer, "that this single act of our (late) gracious sovereign, in recommending to his parliament so important a measure, has been the means of fortifying our liberties with a very strong additional barrier. This alone would have endeared the king (George III.) to his subjects, had he given no subsequent proofs of his earnest desire to extend the civil and religious liberties of his people. This patriotic act of the king is unexampled in history. What was the great charter of our liberties, but the involuntary grant of a cowardly tyrant! What were the religious advantages obtained at the Reformation, but the unforeseen effects of the violence of a capricious monarch! What were the civil privileges secured during the reigns of the Stewarts, but the reluctant concessions of princes who could not resist their parliaments! What, in short, were the blessings of the glorious Revolution, but the conciliating measures of a monarch whose title rested entirely on the national feelings! But in this measure we behold the unbiased, disinterested conduct of a wise and virtuous king, solicitous to provide for the happiness of his subjects."

After the flood it pleased God to enter into a covenant with Noah, the universal sovereign, and of course through him with all sovereign princes, giving him the power of life and death; "whoso sheddeth man's blood, by man shall his blood be shed, for in the image of God made he man," (Gen. ix. 6.) And as mercy is one of the attributes of the Most High, in token of which "I do set my bow in the cloud—and the bow shall be in the cloud, and I will look upon it, that I may remember the everlasting covenant between God and every living creature," so it is also the brightest jewel in every earthly crown, the prerogative of pardoning offences being alone its incommunicable right. At his coronation the king takes a solemn oath in presence of his assembled people, to administer justice in *mercy*. And although he cannot personally distribute justice, yet by a fiction of law, he is always present in every court. The judges are the mirror by which his image is reflected: and hence the king, by a similar fiction, is said to possess *ubiquity*.

To issue *proclamations* is also a prerogative of the crown. Not that a proclamation makes a new law or dispenses with an old one, or that they are any further binding on the subject, than as they promulgate any known or acknowledged law. It is a standing law, that the king can prohibit any one from leaving the kingdom; a proclamation, therefore, laying an embargo on all shipping in time of war, has the full force and efficacy of an act of parliament. But in the time of peace a proclamation, laying an embargo on vessels laden with wheat, is not legal. Proclamations which



are contrary to the laws, are not binding. Hence when James II. prosecuted the seven bishops for presenting their humble petition, showing the illegality of complying with his assumed dispensing power, they were fully acquitted.

The king is the source and fountain of all honour, and the nobility of every rank and degree hold their patents from the crown alone. When titles of honour are conferred, they are either expressed by writ or letters patent, as in the creation of peers or baronets; or by corporeal investiture, as in the creation of a knight. The king also grants privileges to individuals, such as place and precedence, and charters to corporations. He is also the arbiter of commerce, by settling the establishment of public marts and fairs, with their tolls or customs. He also regulates weights and measures. To him "tribute is due—for he is God's minister, attending continually on this very thing;" it is his authority alone which gives value and currency to "Caesar's image and superscription." His proclamation gives value and currency to foreign coin; and he may at any time cry down any coin, and render it no longer current.

The stronger the prerogatives of the crown, the greater is the people's security; and it is absolutely necessary that the crown should be free from all coercion, for whosoever can coerce the king can oppress any other man, and the chief end of government is to preserve the people from each other's oppression. Where the king has not sufficient authority to protect the weak from the tyranny of the strong, when his prerogative is lessened and reduced, then the liberty and freedom of the people is destroyed, and they are let loose like Ishmael, every man against his neighbour, to pillage and oppress, which is the greatest and most wretched tyranny. Both a king and a parliament may be guilty of acts of tyranny and oppression; but such will neither be of so long continuance nor so fatal in their effects; for a king has bowels of compassion, God keeps his heart in his own hand, he cannot seek the destruction of his own country, for in that he would involve himself. Every member of a parliament has a stake in the country, and therefore can never desire its ruin; and although both king and parliament may, and have done, extravagant things, yet they will stop short of its utter desolation, and remedies may be applied. But different and contending factions have neither mercy nor compassion, but each seeks the ruin and extermination of the other, and neither thinks itself safe but in the destruction of the adverse faction. When the prerogatives of the crown are so weakened that it has not strength or authority to quell and keep down factions, but suffers them to contend together, then there is tyranny,—tyranny in the abstract, where there are no bowels of compassion, but blind fury and enmity, totally indifferent and reckless of consequences. And if factions divide the nation, which they almost always do, each appealing to the passions of the multitude, then the calamity becomes national

and the government is swallowed up, and the liberties of the people perish. This worst of all tyrannies is occasioned by the weakness of the crown, and is only prevented by the strength and vigour of the prerogative. There are no limits to the tyranny of factions, but there is a legal constitutional defence against the tyranny of a king, which he can only execute by his ministers, who are answerable with their heads and fortunes for their mal-administration. Therefore let the crown be strong that faction may be weak ; for the people's best security, under God, is in the honour and power of the king. Let the crown flourish, and its enemies be clothed with shame and confusion !

The titles assumed by the sovereigns of the Norman line were, King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Earl of Anjou ; on the conquest of France by Henry V., he added King of France. From the reign of James VI. of Scotland and I. of England, to the close of the eighteenth century, the king hath been styled, King of Great Britain, France, and Ireland, Defender of the Faith. Those of the line of Hanover have added the titles, Dukes of Brunswick and Lunenburg, Arch-treasurer of the holy Roman empire, and electors of Hanover. Since the peace of 1815, George IV. was elevated to the rank of king of Hanover. The arms of England, Scotland, and Ireland, are borne by William IV. quarterly, to which is added an escutcheon of the royal arms of Hanover, surmounted by a regal crown.

Although nothing of the duchy of Aquitaine now remains to our monarchs but the name, yet at their coronation one of the officers of the crown stands upon the right side of the throne, holding a ducal cap and sword of state, in memory of the conquest of that duchy.

The titles of the heir-apparent to the throne are Prince of Wales, Duke of Cornwall and Rothesay, Earl of Chester, Electoral Prince of Brunswick and Lunenburg, Earl of Carrick, Baron of Renfrew, Lord of the Isles, Great Steward of Scotland, and Captain-General of the Artillery Company.\*

## COUNCILS.

In order to assist his majesty in the discharge of the duties of his office, the maintenance of his dignity, and the exertion of his just prerogative, several councils have been appointed for the king to advise with.

*First.* The high court of parliament, which is the great council of the nation, and of which we have already treated.

\* Blackstone's Commentaries,—Custance on the Constitution.

*Second.* The peers of the realm are, by their birth-right, hereditary councillors of the crown, and the king may at any time call them together to give him their advice in all matters of importance to the realm, either during the sitting of parliament, or when there has been no parliament in being, which, says Blackstone, has been their principal use. The law maintains that peers are created for two reasons: 1. *ad consulendum*, as councillors; 2. *ad defendendum regem*, for the king's defence: on which account in law they are entitled to certain great and high privileges, even when no parliament is sitting; because it contemplates that they are always assisting the king with their council for the public good, or preserving the realm in safety by their prowess and valour. As hereditary councillors, they enjoy the privilege of being exempt from arrest for debt, because the law supposes that the peers are always engaged in the king's service, either in council or war. Any peer, in his character of an hereditary councillor of the crown, can demand an audience of the king, to lay before him, with decency and respect, such matters as he shall consider of importance to the state.

*Third.* A third council is the judges of the courts of law, but only in legal cases.

*Fourth.* But the king's principal council is his *Privy Council*, which, by way of eminence, is generally called *the Council*; and this, according to Sir E. Coke, is a noble, honourable, and reverend assembly of the king, and such as he *wills* to be of his privy council in the king's court or palace. The king's *will* is the sole constituent of a privy councillor, which also regulates their number, which anciently was only twelve; afterwards, the number was so considerably increased, that it was found to be inconvenient for secrecy and despatch, and therefore Charles II. in the year 1679, limited its number to thirty, whereof fifteen were to be the principal officers of state, who should be councillors *virtute officii*, and the other fifteen were composed of ten lords and five commoners of the king's choosing. But at present the number is indefinite. The lord president of the council has precedence next after the lord chancellor and lord treasurer. The *Cabinet Council* consists of the king's ministers for the time being, and who are summoned to consult on the important and arduous discharge of the executive government.

Privy Councillors are made by the king's nomination, without either patent or grant, and on taking the necessary oaths, they become immediately councillors, during the lifetime of the king who appoints them, but subject to removal at his discretion. Any natural-born subject of England is capable of being a member, after taking the oaths, and *formerly* the test for the church's security.

The oath of office, which consists of seven articles, distinctly points out a privy councillor's duties,—1. To advise the king according to the best

of his cunning and discretion. 2. To advise for the king's honour, and good of the public, without partiality, through affection, love, meed, doubt, or fear. 3. To keep the king's council secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary; and *lastly*, in general, to observe, keep, and do all that a good and true councillor ought to do to his sovereign lord.

The *power* of the Privy Council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction does not extend to the punishment of the culprit, but merely to make inquiry, and he is entitled to his *habeas corpus*. In plantation and admiralty causes which arise without the jurisdiction of the kingdom, and in matters of lunacy or idiocy, being a special flower of the prerogative, although they may eventually involve questions of extensive property, the privy council still continues to have cognizance, being the court of appeal in such cases, or rather the appeal lies to the king's majesty himself in council. Whenever questions arise between two provinces in America, or elsewhere, concerning the extent of their charters, or the like, the king in council exercises *original* jurisdiction, on the principles of the feudal sovereignty. And, likewise, when any person claims an island or a province in the nature of feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council; and from all the dominions of the crown, excepting Great Britain and Ireland, an appellate jurisdiction in the last resort is vested in the privy council, which usually exercises its judicial authority in a committee of the whole council, who hear the allegations and proofs, and afterwards make their report to his majesty in council, by whom the judgment is finally given.

Abstracted from their honorary precedence, the privileges of privy councillors consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. By statute 3d Hen. VII. c. 14, if any of the king's servants, of his household, conspire or imagine to take away the life of a privy councillor, it is felony, even although no attempt be made. But the statute 9th Anne, c. 16, goes farther, and enacts, that if "any person shall unlawfully attempt to kill, assault, strike, or wound any privy councillor in the execution of his office, shall be a felon, without benefit of clergy." This statute was made in consequence of the daring attempt of the *Sieur Guiscard* to stab Mr *Harley* with a pen-knife, when under examination by the privy council.

Privy councillors have honorary precedence next after knights of the garter. The dissolution of the privy council depends entirely on the king's pleasure, and he may, whenever he thinks proper, discharge any particular member, or the whole council, and appoint another. Formerly it was

dissolved, *ipso facto*, on the king's demise, as deriving its whole authority from him. But now, to prevent the inconvenience arising from there not being any council in being at a new accession, it was enacted, 6th Anne, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

Such, says a late writer, are the duties and privileges of the privy council; and whoever duly reflects, that, upon their wisdom, diligence, and integrity, the interests and happiness of the whole kingdom very much depend, will see the propriety of our public petition, "that God would be pleased to bless the lords of the council, and all the nobility, with grace, wisdom, and understanding." \*

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## OF COURTS IN GENERAL.

THE wrongs and injuries which men commit upon each other are various and grievous, even in the most civilized states; and these would be still more numerous, were it not for the salutary restraints of human laws. Such wrongs and injuries are either of a civil or of a criminal nature. Under the former description may be reckoned any species of trespass, nuisance, waste, subtraction, or disturbance, and likewise all kinds of injuries proceeding from, or affecting, the crown.

Under the latter are comprised all offences against God and religion; against the law of nations; against public justice; against the public peace; against public trade; against the public health and economy; against the persons, habitations, and property of individuals. Our limits will not admit of treating specifically of these several denominations of civil and criminal offences. But this is the less necessary, inasmuch as every description and modification of offence is a breach of one or other of the Ten Commandments; which teach us our duty towards God, and our duty towards our neighbour. We have no occasion to refer to law-books to ascertain how we ought to act one towards another; for the work of the law is written in every man's *heart*, his conscience also bearing him witness. And if any man will but do unto others upon all occasions as he would they should do unto him under similar circumstances, he will never suffer any thing from the laws of England, which are constantly stretched forth to protect him. It is sufficient then to remark, that "the law is not made for a righteous man, but for the lawless and disobedient;" that is, only such are amenable to its tribunals, and liable to its penalties. "It

\* Blackstone's Commentaries,—Custance on the Constitution.

must needs be that offences must come." There will always be the offenders and the offended : but it is the voice of reason as well as of revelation, that no man ought to decide in his own cause ; and it is the language of the inspired volume, that "if one man sin against another, the judge shall judge him." Every well-regulated government has its courts of law, in which persons duly qualified and authorized preside, for the administration of justice. The institution is of divine appointment ; "Judges and officers shalt thou make thee in all thy gates, which the LORD thy God giveth thee, throughout thy tribes : and they shall judge the people with just judgment." (Deut. xvi. 18.)

A court is defined to be "a place where justice is judicially administered." The king is the sole executer of the laws, and it follows, that all the courts of justice within the realm derive their power and authority from him alone ; his consent to their existence being at all times either expressed or implied. The law always contemplates the king's presence, in all his courts, by a sort of fiction, but as that is in fact impossible, he is represented there by his judges, whose power is merely an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law has appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction ; some constituted to inquire only ; others to hear and determine ; some to determine in the first instance ; others upon appeal and by way of review : all these in their turns will be noticed and described in their respective places ; and I shall here only mention one distinction that runs through them all : that is, that some of them are courts of *record* and others *not of record*. A court of *record* is that where the acts, and judicial proceedings are enrolled in parchment, for a perpetual memorial and testimony. These *rolls* are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, and no other court has any authority to fine and imprison. A court *not of record*, is that of a private man, whom the law will not intrust with any discretionary power over the liberty and fortunes of his fellow subjects. The courts-baron in every manor, and other inferior jurisdictions, where the proceedings are not recorded or enrolled, are courts *not of record*. But as well their existence as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury. These courts cannot hold pleas of matters cognizable by the common law, unless they be under the value of 40s., nor of any forcible injury whatsoever ; because they have not any process to arrest the defendant's person.

In every court there must be at least three constituted parts. The Plaintiff, who complains of an injury done ; the Defendant, who is called upon to make satisfaction for the injury ; and the judicial power which is to examine into the fact, determine the law arising upon it, to ascertain whether any injury has been done, and by its officers to apply the remedy. In the higher courts the usual assistants are attorneys, and advocates, or counsel.

An attorney at law, is one who is put in the place, *stead*, or *turn* of another, to manage his matters of law for him. Formerly every suitor was obliged to appear in person, to prosecute or defend his own cause ; which is still the law in criminal cases. An idiot cannot appear by his attorney, because he has not discretion to enable him to appoint a suitable person in his stead. He must therefore appear in person, and the judge is bound to take care of his interest ; and admit the best plea in his behalf that any one in court can suggest. No one can practise as an attorney in any court, but in that of which he is sworn an attorney ; and as he enjoys many privileges in that court, so he is also peculiarly subject to the censure and animadversion of its judges. To enable an attorney to practise in the court of chancery, it is necessary that he be admitted a solicitor therein. And none can act as attorneys at the quarter sessions, but such as have been regularly admitted into some superior court of record ; and attorneys are subjected to various other regulations, by different statutes. So early as the reign of Henry IV. (4. c. 18.) it was enacted, that all attorneys should be examined by the judges, and none be admitted but such as were virtuous, learned, and sworn to do their duty.

Advocates, or, as they are commonly called, *counsel*, are of two degrees, barristers and sergeants. The former are admitted, after a considerable period of study and standing, in the inns of court ; and are in all the old law books styled *apprentices*, being looked upon merely as learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing ; at which time they may be called to the honourable state and degree of sergeants. Sergeants at law are bound by a solemn oath to do their duty to their clients with fidelity and discretion.

His majesty's two principal counsel, are the attorney-general and solicitor-general, who may be either barristers or sergeants. The king's counsel cannot be employed in any cause against the crown, without special license ; hence they cannot publicly plead in court for a prisoner, or a defendant in a criminal prosecution, without license, but which is never refused. In obtaining it, however, an expense of nine pounds is incurred.

A custom has of late years prevailed, of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction ; whereby they are entitled to such rank and precedence as are assigned in their respective patents : sometimes next after the

king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts : but receive no salaries and are not sworn ; and therefore are at liberty to be retained in causes against the crown. All other sergeants and barristers indiscriminately (except in the court of common pleas, when only sergeants are admitted) may take upon them the protection and defence of any suitors, whether plaintiff or defendant ; who are therefore called their *clients*, like the dependants before the ancient Roman orators. These indeed practised *gratis* for honour merely, or at most for the sake of gaining influence : and so likewise it is established with us, that a counsel can maintain no action for his fees ; which are given as a mere gratuity and not as a salary or hire, and which a counsellor cannot demand without injuring his reputation ; the same is also laid down with regard to the advocates in the civil law, whose *honorarium* or gratuity was directed by a decree of the Senate not to exceed in any case ten thousand sesterces, or about eighty pounds of English money. And in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of venal and illiberal men, (some of whom, who would prostitute their talents and acquirements to any cause, will insinuate themselves into the most honourable professions,) counsel are indulged with liberty of speech in defence of their clients, and are not answerable for any matter spoken by them relative to the cause in hand, and suggested in their client's instructions, although it should prove altogether a groundless reflection on another's reputation. But if they should mention an untruth of their own invention, the injured party may bring his action. By the statute of 3 Edward I., counsel may be punished for collusion and deceit, with imprisonment for a year and a day, and perpetual silence in the courts. But, to the honour of our courts, the corruption of judges and the treachery of counsel are crimes now unheard of in these kingdoms. Indeed the wisdom and integrity of the British courts are justly proverbial.\*

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### COURTS OF COMMON LAW AND EQUITY.

**PIEPOUDRE.**—The lowest, and at the same time the most expeditious court of justice, known in England, is the court of *piepoudre*, so called from the dusty feet of the suitors. It is a court of record, incident to

\* Custance,—Blackstone.



every fair and market ; of which the steward of him who owns or has the toll of the market, is the judge ; and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within the compass of one and the same day, unless the fair continues longer. This court has cognizance of all matters of contract that can possibly arise within the precincts of that fair or market ; and the plaintiff must make oath that the cause of an action arose there. From this court a writ of error lies, in the nature of an appeal to the courts of Westminster, which are bound to issue writs of execution, in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction.

THE COURT BARON, is a court incident to every manor in the kingdom, to be holden by the steward within the manor. This court baron is of a double nature ; one is a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other is a court of law, and it is the court of the barons, by which name the freeholders were sometimes anciently called : for that is held before the freeholders, who owe suit and service to the manor, the steward being rather the registrar than the judge.

A HUNDRED COURT is only a large court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the case of a court baron. It is not a court of record ; but resembles the former in all points, except that in point of territory it is of a greater jurisdiction. But these courts are fallen into disuse with regard to the trial of actions, because the causes are liable to be removed to the superior court, and may also be reviewed by writ of false judgment.

THE COUNTY COURT is incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of 40*s*. But as proceedings in these courts, are removable into the king's superior courts, and as a writ of false judgment may be had, in nature of a writ of error, bringing actions into this court has fallen into disuse.

COMMON PLEAS.—This court is sometimes called in law, the court of *common bench*. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other, the court of chancery issuing all original writs under the great seal to the other courts ; the common pleas being allowed to determine all causes between private subjects, the exchequer managing the king's revenue, and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts,

and particularly the superintendence of all the rest, by way of appeal, and the sole cognizance of pleas of the crown, or criminal cases: For pleas, or suits, are regularly divided into two sorts; *pleas of the crown*, which comprehend all criminal misdemeanors wherein the king, on behalf of the public, is plaintiff—and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench, the latter of the court of common pleas; which is a court of record, and is styled the lock and key of the common law; for herein only can real actions which concern the right of freehold or the reality, be originally brought; and all other, or personal pleas, between man and man, are likewise here determined; though in most of *them* the king's bench has also a concurrent authority. The judges of this court are at present four in number, one chief, and three *puise* (pronounced puny) justices created, by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. Of these it takes cognizance, as well originally, as upon removal from the inferior courts before mentioned. But a writ of error in the nature of an appeal, lies from this court into the court of king's bench.

**COURT OF KING'S BENCH.**—This court is so called because the king used to sit there in person, and the style of the court is still *coram ipso rege*. It is the supreme court of common law in the kingdom; consisting of a chief justice and three *puise* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed to do so, he did not determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority.

The jurisdiction of this court is very high, and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in any case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance of both criminal and civil causes; the former in what is called the crown-side, or crown-office, the latter in the plea-side of the court.

For this court is likewise a court of appeal, into which may be removed, by writ of error, all determinations of the court of common pleas, and of all inferior courts of record in England; and to which, till lately, a writ of error lay also from the court of king's bench in Ireland. Yet even this so high and honourable court is *not* the *dernier resort* of the subject; for if he be not satisfied with any determination here, he may remove it

by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

THE COURT OF EXCHEQUER is inferior in rank, not only to the court of king's bench, but to the common pleas also. It is a court, both of law and equity, and is principally intended to order the revenues of the crown, and to recover the king's debts and duties. Its name of exchequer, (*scaccarium*,) arises from the chequered cloth, resembling a chess board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions; the receipt of the exchequer, which manages the royal revenue, and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

The court of equity is held in the exchequer chamber, before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisne* ones. Its primary and original business is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court, so also the king's debtors and farmers, and all accountants of the exchequer, are privileged to sue and implead all manner of persons, in the same court of equity that they themselves are called into: they have likewise the privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personality is concerned) as are prosecuted in the court of common pleas. On the equity side of this court, the clergy have long been used to exhibit their bills for non-payment of their tithes, in which case the surmise of being the king's debtor is not a fiction, the clergy being bound to pay him their first fruits and annual tenths. But the chancery has of late years obtained a large share of this business. An appeal from the equity side of this court lies immediately to the house of peers; but from the common law side, a writ of error must be brought into the court of exchequer chamber. And from the determination there had, there lies, in the last resort, a writ of error to the house of lords.

THE HIGH COURT OF CHANCERY is the last and most important court in matters of civil property, of any of the king's supreme and original courts of justice. The office of chancellor, or lord keeper, is at present created by the mere delivery of the king's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord. He is a privy councillor by his office, and prolocutor of the house of lords by prescription. The

appointment of all the justices of the peace throughout the kingdom belongs to him. Formerly he was usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience, visitor, in the king's right, of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals, the one ordinary, being a court of common law, and the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias*, to repeal and cancel (hence the name *cancellarius*,) the king's letters patent, when made against law, or upon untrue suggestions: and to hold pleas of petitions, *monstrans de droit*, traverses of offices, and the like; when he has been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. On proof of which, as the king can do no wrong, nor can he be supposed to intend to do any wrong, the law does not question but that he will immediately redress the injury, and refers that conscientious task to the chancellor, the keeper of his conscience. This court also holds pleas of all personal actions, when any officer or minister of the court is a party. It might likewise hold pleas of partitions of lands in coparcenary and of dower, when any ward of the crown was concerned in interest, so long as the military tenures subsisted; and it may also do so now of the tithes of forest lands, when granted by the king, and claimed by a stranger against the grantee of the crown; and of executions on statutes, or recognizances in nature thereof. But if any cause comes to issue in this court, that is, if any fact is disputed between the parties, the chancellor cannot try it, having no power to summon a jury, but must deliver the record *propria manu* into the court of king's bench, where it shall be tried by the country, and judgment shall be there given thereon. And when judgment is given in chancery upon demurrer or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of king's bench; for which reason very little is usually done on the common law side of the court.

In this ordinary or legal court is also kept the *officina justitiæ*, out of which issue all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like; and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiæ*, any writ that his occasions may call for. These writs and their returns, were, according to the simplicity of

ancient times, originally kept in a hamper, in *hanaperio*, and the others which relate solely to the crown, were preserved in a little sack or bag, in *parva бага*; hence arises the distinction of the *hanaper* and *petty bag* offices, which both belong to the common law court in chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, nor seems ever to have been known in any other country at any time. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in enabling many great men who have presided in chancery, to build a system of jurisprudence and jurisdiction upon broad and rational foundations. And the power and business of this court have now increased to an amazing degree.

From the court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1st, That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment: 2d, That on writs of error the house of lords pronounces the judgment; on appeals it gives direction to the courts below to rectify its own decree.

**COURT OF EXCHEQUER CHAMBER.**—This court has no original jurisdiction, but is simply a court of appeal, to correct the errors of other jurisdictions. It was first erected in the reign of Edward III. to determine causes upon writs of error from the common law side of the court of exchequer. It consists of the lord chancellor and lord treasurer, associating with themselves, the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber was erected by statute in the twenty-seventh year of the reign of Elizabeth, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse judgments in certain sorts originally begun in the court of king's bench. Also into the court of exchequer chamber (which then consists of all the judges of the three superior courts, and sometimes the lord chancellor also), such causes are occasionally adjourned from the other courts, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. From all branches of this court of exchequer chamber, a writ of error lies to the house of peers.

**THE HOUSE OF PEERS** is the supreme court of judicature of the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below, and is in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate

tribunal must conform to their determinations, the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that they will make themselves masters of those questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them : since upon their decision all property must finally depend.

THE COURTS OF ASSIZE AND NISI PRIUS are derived out of, and act as collateral auxiliaries to, the foregoing courts. They are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom, (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts, and except the four northern counties, where the assizes are holden only once a-year,) to try by a jury of the respective counties the truth of such matters of fact as are there under dispute in the courts of Westminster Hall. The judges usually make their circuits in the respective vacations after Hilary and Trinity terms.

The judges upon their circuits sit by virtue of five several authorities. 1st, The commission of the *peace*. 2d, A commission of *oyer and terminer*. 3d, A commission of general *jail delivery*. 4th, A commission of *assize* directed to the justices and sergeants therein named, to take, together with their associates, assizes in the several counties ; that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of *landed disputes*. 5th, The last is that of *nisi prius*, which is a consequence of the commission of *assize*, being annexed to the office of those justices by statute, and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These, by the course of the courts, are usually appointed to be tried at Westminster, in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises, but with this proviso, *nisi prius* ; that is, *unless before* the day prefixed, the judges of assize come into the county in question. This they are sure to do in the vacations preceding Easter and Michaelmas term, which saves much expense and trouble.

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## ECCLESIASTICAL, MILITARY, AND MARITIME COURTS.

BESIDES the several courts just named, in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there still remain some other courts of a jurisprudence equally public and general, which

take cognizance of other species of injuries of an ecclesiastical, military, and maritime nature.

In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts christian, we shall begin with the lowest, and ascend gradually to the supreme court of appeal.

THE ARCHDEACON'S COURT is the most inferior court in the whole ecclesiastical polity. In the archdeacon's absence, it is held before a judge of his own appointment, who is called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. An appeal, however, lies from this court to that of the bishop.

THE CONSISTORY COURT of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor or his commissary, is the judge; and from his sentence an appeal lies to the archbishop of each province respectively.

THE COURT OF ARCHES is a court of appeal belonging to the archbishop of Canterbury, and the judge is called the dean of the arches; because he anciently held his court in the church of St Mary *le bow*, though all the principal spiritual courts are now holden at doctor's commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches, having been for a long time united with that of the archbishop's principal official, he now, in right of the last mentioned office, (as does also the principal official of the archbishop of York,) receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him an appeal lies to the king in chancery, that is, to a court of delegates appointed under the king's great seal, as supreme head of the English church.

THE COURT OF PECULIARS is a branch of, and annexed to, the court of arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary jurisdiction, and subject to the metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are originally cognizable by this court, from which an appeal lies to the king in chancery.

THE PREROGATIVE COURT is established for the trial of all testamentary causes, where the deceased has left *bona notabilia* within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons, are originally cognizable in this court, before a judge appointed by the archbishop, called the judge of the prerogative court, from whom an appeal lies to

the king in chancery. The granting of letters of administration, in the event of a person dying intestate, and the probates of Will, has ever belonged to bishops, not only in England but in all countries wherever Christianity has been established ; nor is there any other court in which wills can be regularly proved, except in some particular boroughs where the chief magistrate may do it by prescription. Our reason for intrusting this power to bishops was, that whatever was given to pious uses might be faithfully applied ; and those wills where such charities are given, are called by the canonists *privileged wills* ; for by the canon law, what would annul another will, has no effect on these. In former times Ordinaries had the power of applying some part of the goods of a person dying intestate to pious uses, especially if he were a clergyman ; and by the statute of Edward II., “the profits of the lands of *idiots*, if there be any at the time of their deaths remaining, more than was necessary for the use of them and their families, shall be distributed for their souls, by the advice of the Ordinary.”

THE GREAT COURT OF APPEAL in all ecclesiastical causes, viz. the court of DELEGATES appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals made to him by virtue of 25 Henry VIII. This commission is frequently filled with lords spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law. But in case the king himself be a party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd, but by statute 24 Henry VIII. to all the bishops of the realm, assembled in the upper house of convocation.

A commission of *review* is sometimes granted in extraordinary cases, to revise the sentence of the court of delegates, when it is apprehended they have been led into a material error. But it is not a matter of right which the subject may demand, *ex debito justiciæ*, but entirely a matter of favour, and which has been accordingly often denied.

These are now the principal courts of ecclesiastical jurisdiction, none of which are allowed to be courts of record.

COURTS MILITARY.—The only court of this nature known to, and established by the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and earl marshal of England jointly. The statute of 13 Richard II. gave this court the cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. And from its sentences an appeal lies immediately to the king in person ; but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments ; as it can neither fine nor imprison, not being a court of record.



THE MARITIME COURTS, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law, are only the court of ADMIRALTY and its courts of appeal. The court of admiralty is held before the lord high admiral of England or his deputy, who is called the judge of the court. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts at doctors' commons in London. It is not a court of record any more than the spiritual courts. An appeal always lies in ordinary course from the sentences of the admiralty judge to the king in chancery. But it is expressly declared by statute, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by the commission shall be final.

Appeals from the courts of vice-admiralty in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize-vessels taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals, consisting chiefly of the privy council, and not to judges delegates. The original court, to which this court is permitted in England, is the court of admiralty; and the court of appeal is in effect the king's privy council, the members of which are in consequence of treaties, commissioned under the great seal for this purpose.

To the crown of Great Britain belongs the dominion of all the narrow seas which surround the island, by ancient and immemorial right, and of which it has kept possession in all past times. Mr Selden makes it appear, that before the invasion of Julius Cæsar, the aboriginal inhabitants possessed this right, and after their subjugation, the Romans held it by the right of conquest. On the expulsion of the Romans, the Saxon conquerors claimed, and held the sovereignty of the surrounding narrow seas; and king Edgar, among his royal titles, styled himself "sovereign of the narrow seas." The claim of sovereignty was continued by the Norman conqueror; and under that more rigorous dynasty, the Swedes, Danes, Hanse Towns, Dutch, Zealanders, &c., were compelled to ask permission and to take licenses for fishing in the British seas; and as a token of the British sovereignty, were obliged to lower their top-sails when passing a British ship of war, in conformity with an ordinance made by king John at Hastings in Sussex.

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## COURTS OF SPECIAL JURISDICTION.

In the two preceding sections, we have considered the several courts whose jurisdiction is public and general; and are so contrived that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remains certain others, confined to particular spots, or instituted only for the redress of particular injuries, and whose jurisdiction is private and special.

These are, I. THE FOREST COURTS, instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or venison, to the *vert* or green-sward, and to the *covert* in which such deer are lodged. These are the courts of *attachments*, of *regard*, of *swein mote*, and of *justice-seat*. But since the era of the Revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.

II. A second species of private courts, is that of commissioners of *sewers*. This is a temporary tribunal, erected by virtue of a commission under the great seal; which formerly used to be granted *pro re nata*, at the pleasure of the crown: but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Henry VIII. Their jurisdiction is to overlook the repairs of sea banks and sea walls; and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off; and is confined to such county or particular district, as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts; and in the execution of their duty, may proceed by jury or upon their own view, and may take order for the removal of any annoyances, or for the safeguard or conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary: and if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Henry VIII., sell his freehold lands in order to pay such scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings.

III. The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Elizabeth, which enables the lord chancellor to grant yearly a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister,

are thereby, and by statute 13 and 14 Char. II. empowered to determine in a summary way, all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandise, and to suits brought by the insured only, and not by the insurers, no such commission has of late years been issued; but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final.

IV. The court of MARCHALSEA and the PALACE COURT at Westminster, though two distinct courts, are frequently confounded together. These courts have jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his Majesty's palace at Whitehall, and are now held once a-week in the borough of Southwark, and a writ of error lies from thence to the court of king's bench. But if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas, by a writ of *habeas corpus cum causa*; but the inferior business of the court has of late years been much reduced by the new courts of conscience erected in the environs of London.

V. Another species of private courts of a limited though extensive jurisdiction, are those of the principality of Wales. By several statutes of Henry VIII., courts-baron, hundred, and the county courts are established there, the same as in England. A session is also to be held once in every year, in each county, by judges appointed by the king, called the great sessions of the several counties in Wales; in which all pleas of real and personal actions shall be held, with the same form of process, and in as ample a manner as in the court of common pleas at Westminster; and writs of error shall lie from judgments therein (it being a court of record), to the court of king's bench at Westminster.

VI. The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of that duchy or his deputy, concerning all matters of equity relating to lands holden of the king in right of the duchy of Lancaster; which is a thing very different from a county palatine, (which has its separate chancery for sealing of writs and the like,) and comprises much territory which lies at a vast distance from it, particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery, so that it seems not to be a court of record; and indeed it has been holden that these courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes.

VII. There are a species of private courts which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity; as those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely. In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For originally all *jura regalia* having been granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another prince's court in what manner to administer justice between the suitors. But when Henry VIII. abridged the privileges and franchises of these county palatines, it was enacted by statute 27 Henry VIII. that all writs and processes should be made in the king's name, but should be witnessed in the name of the owner of the franchise. Wherefore, all writs whereon actions are founded, and which have current authority in the counties palatine, must be under the seal of the respective franchises; the two former of which are now united to the crown, and the two latter under the government of their several bishops. And the judges of assize who sit therein, hold their seat by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of England. Hither also may be referred the courts of the *cinque ports*, or five most important havens, as they were formerly esteemed; viz. Dover, Sandwich, Romney, Hastings, and Hythe, to which Winchelsea and Rye have been since added; which have also similar franchises in many respects with the counties palatine, and particularly an exclusive jurisdiction before the mayor and jurats of the ports, within which exclusive jurisdiction the king's writ does not run. A writ of error lies from the mayor and jurats of each port, to the lord warden of the *cinque ports* in his court of Shepway, and from the court of Shepway to the king's bench. And a writ of error lies also from all the other jurisdictions to the same supreme court of judicature, as an ensign of superiority reserved by the crown at the original creation of the franchises. And all prerogative writs, such as *habeas corpus*, prohibition, *certiorari*, and *mandamus*, may issue for the same reason to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king.

VIII. The STANNARY Courts in Devonshire and Cornwall for the administration of justice among the tinners, are also courts of record, but of the same private and exclusive nature. They are held before the lord Warden and his substitutes, in virtue of a privilege granted to the workers in the tin mines there, to sue and be sued only in their own courts, that

they may not be drawn from their business, which is highly profitable to the public, by attending their lawsuits in other courts. What relates to our present purpose is only this, that all tinner's and labourers, in and about the stannaries, shall, during the time of their working therein *bona fide*, be privileged from suits of other courts, and be only impleaded in the Stannary court in all matters, excepting pleas of land, life, and member. No writ of error lies here to any court in Westminster hall. But an appeal lies here from the steward of the court, to the under warden, and from him to the lord warden, and thence to the privy council of the prince of Wales, as duke of Cornwall, when he hath had livery or investiture of the same. And from thence the appeal lies to the king himself in the last resort.

IX. These several courts of justice within the city of London, and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also of the same private and limited species. It would exceed the limits of this work to enter into a particular detail of these, and to examine into the nature and extent of their several jurisdictions.

But there is one species of courts constituted by act of parliament in the city of London, and other trading and populous districts, which differs so much in its proceedings from the course of the common law, that it deserves a more particular consideration. We mean the COURTS OF REQUESTS, or courts of conscience, for the recovery of small debts. In these courts, two aldermen and four commoners sit twice a week, to hear all causes of debt not exceeding the value of forty shillings; which they examine in a summary way, by the oath of the parties, or other witnesses and make such order therein, as is consonant to equity and good conscience. The time and expense of obtaining this summary redress, are very inconsiderable, which make it a great benefit to trade; and in consequence, several trading towns, and other districts, have obtained acts of parliament for establishing courts of conscience upon nearly the same plan as that in the city of London.

X. There is yet another species of private courts, which must not be omitted in this notice, viz. the chancellor's courts in the two universities of Oxford and Cambridge; which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever when a scholar or privileged person is one of the parties, excepting in such cases where the right of freehold is concerned. So far as the privilege relates to civil causes, it is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy, or assessor; from whose sentence an appeal lies to delegates appointed by the Congregation; from thence to other delegates of the house of Convocation, and if they all three concur in the same sentence, it is final; at least by the statutes of the university, according to the rule of the civil

law. But if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort, to judges delegates appointed by the crown, under the great seal in chancery.

**DOCTORS COMMONS.**—This college of civilians is established for the study of the civil law, in which, courts are kept for the trial of civil and ecclesiastical causes, under the archbishop of Canterbury and the bishop of London, as in the court of arches and the prerogative court. There are also offices in which wills are deposited and searched, and a court of faculties and dispensations. The name of commons is given to this college, from the circumstance of the civilians communing together as in other colleges. This edifice is situated in Great Knight Rider Street, near the college of arms, on the south side of St Paul's Cathedral. The old building which stood in this place was purchased for the residence of the civilians and canonists, by Henry Harvey, doctor of the civil and canon law, and dean of the arches. But this edifice being destroyed by the general devastation in 1666, they removed to Easter House, in the Strand, where the civilians had their chambers and offices, and their courts were held in the hall. But some years after, the commons being rebuilt in a more convenient and elegant manner than before, the civilians returned thither. The causes of which the civil or ecclesiastical law do, or may, take cognizance, are, blasphemy, apostasy, heresy, ordinations, institutions to benefices, celebration of divine service, matrimony, divorces, bastardy, tithes, oblations, obventions, mortuaries, dilapidations, reparations of churches, probates of wills, administrations, simony, incest, fornication, adultery, pensions, procurations, commutation of penance, right of pews, and others of the same kind. Those who practise in these courts are divided into two classes, advocates and proctors. The advocates are such as have taken the degree of doctor of civil law, and are retained as counsellors and pleaders. These must first, upon their petition to the archbishop, obtain his fiat, and thus they are admitted by the judge to practise. The following is their mode of admission: Two senior advocates in their scarlet robes, with the mace carried before them, conduct the doctor up the court with three reverences, and present him with a short Latin speech, together with the archbishop's rescript. Then, having taken the oaths, the judge admits him, and assigns him a place or seat in the court, which he is always to keep when he pleads. Both the judge and advocate, if of Oxford, wear in court scarlet robes, and hoods lined with taffeta; but if of Cambridge, white minever, and round black velvet caps. The proctors or procurators exhibit their proxies for their clients, and make themselves parties for them, and draw and give pleas, or libels and allegations in their behalf, produce witnesses, prepare causes for sentence, and attend the advocates with the proceedings. These are also admitted by the archbishop's fiat, and introduced by two senior proctors. They wear black robes and

hoods, lined with fur. The terms for the pleading and ending of causes in the civil courts, are but slightly different from the term times of the common law. The order as to the time of the sitting of the several courts, is as follows. The court of arches having the pre-eminence, sits first in the morning, the court of admiralty sits in the afternoon in the same day, and the prerogative court also sits in the afternoon.

**INSOLVENT DEBTORS' COURT.**—The defective state of the law respecting the issuing of *mesne process*, and the frequency of insolvency acts, rendered some such court as this necessary. It was established about the year 1814, as an experiment for five years, being chiefly founded on the *cessio bonorum* principle of the law of Scotland; a debtor is entitled to petition for his discharge out of prison, after an imprisonment of three months, on condition of surrendering all his effects for the use of his creditors. This discharge, if it should not be conditional, on the ground of extravagance, or fraud having been committed by the debtor, releases the person; but any property that can be traced to him, although it may have been subsequently acquired, is liable for the payment of his debts; the person is for ever released, but *property* never, so long as any debts remain unsatisfied, where there is an unconditional discharge.

The acts constituting the insolvent debtors' court, contain the regulations for its guidance, and appoint a commissioner to carry them into effect. The construction to be put upon these laws is left to his sole discretion; there is no intervention of a jury; and thus the court partakes of the mingled principles of law and equity, having specific regulations to enforce, at the same time possessing a large discretionary power.

How far the principle of releasing the person, and fixing the property of a debtor, have answered the expectations of the supporters of this change in the practice of the common law, we shall not pretend to decide, in an impartial matter-of-fact work like the present; but to assist in others coming to a conclusion, on what so materially affects credit and the interests of trade in general, the following facts may not be unacceptable; they are drawn from the Commons' report on the subject, which the house ordered to be printed a very short time after the constitution of the court.

Feb. 1st, 1816, there had been presented 7,509 insolvent debtors' petitions; of these 1,419 were withdrawn in consequence of the 54 Geo. III., so that 6,090 petitions remained; of that number 5,511 had been heard, determined, and discharges ordered. There were 186 petitions remanded, and 393 not finally determined, which made up the 6,090 petitions.

The amount of debts in the schedule withdrawn, was . . . . .	£1,132,171
Ditto of the petitions remanded . . . . .	220,099
Total gross amount of the schedule of all the petitions presented . . . . .	5,698,574

On the other side of the statement we find, that assigning of the effects of 500, out of the 5,511 debtors, had been appointed: and that the assignees,

in fifteen of these cases, had made returns to the court. The gross amount of their returns was £1,499, 4s.

According to returns made in the house of commons, founded on the above, and subsequent returns to March, 1817, there had been about nine thousand persons liberated, whose debts amounted to nearly nine millions; and the average dividend resulting from the property given up to the creditors, was a quarter of a farthing, and half a farthing in the pound! Mr Alderman Waithman, arguing from what had passed, declared, that by the time this act expired, there would be liberated 14,000 persons, and fifteen millions of debts. In the course of the examinations which took place before the house of commons, the imperfect state of the laws affecting debtor and creditor was made still more manifest, as will appear from the following singular document, extracted from the evidence of Mr Clark, at that time clerk of the insolvent debtors' court, "showing how a debtor may harass a creditor," and sold among the prisoners at sixpence each.

"When arrested and held to bail, and after being served with a declaration, you may plead a general issue, which brings you to trial sooner than any plea that you can put in; but if you want to vex your plaintiff, put in a special plea; and if in custody, get your attorney to plead in your name, which will cost you £1, 1s. and your plaintiff £1, 10s. as expenses. If you do not mean to try the cause, you have no occasion to do so till your plaintiff gets judgment against you; he must, in the term after you put in a special plea, send in what is termed the paper book, which you must return with 7s. 6d., otherwise you will not put him to half the expenses. When he proceeds and has received a final judgment against you, get your attorney to search the office appointed for that purpose in the temple, and when he finds that judgment is actually signed, he must give notice to the plaintiff's attorney, to attend the master to tax his costs, at which time your attorney must have a writ of error ready, and give it to the plaintiff's attorney before the master, which puts him to a very great expense, as he will have the same charges to go over again. The writ of error will cost you £4, 4s.; if you want to be farther troublesome to your plaintiff, make your writ of error returnable in parliament, which costs you £8, 8s. and your plaintiff £100. Should he have courage to follow you through all your proceedings, then file a bill in the exchequer, which will cost him five or six pounds more, and if he answers it, it will cost him £80 more; after this you may file a bill in chancery, which will cost about £10, and if he does not answer this bill, you will get an injunction, and at the same time an attachment from the court against him, and may take his body for contempt of court in not answering your last bill; you may file your bill in the court of chancery instead of the exchequer, only the latter costs you the least. If you are at any time served with a copy of a writ, take no farther notice of it than by keeping



it: when you are declared against, do not fail to put in a special plea immediately, and most likely you will hear no more of the business, as your plaintiff will probably not like to incur any further expense, after having been at so much."

## DEFENDANT'S COSTS.

Common Plea, . . . . .	£0	3	6
Special do. . . . .	1	1	0
Paper book, . . . . .	0	7	6
Writ of error, . . . . .	4	4	0
Do. returnable in parliament, . . . . .	8	8	0
Filing bill in exchequer, . . . . .	6	6	0
Do. in chancery, . . . . .	10	0	0
	£30	10	0

## PLAINTIFF'S COSTS.

Answer to special plea, . . . . .	£30	0	0
Do. to writ of error, . . . . .	100	0	0
Do. to bill in exchequer, . . . . .	84	0	0
Do. do. in chancery, . . . . .	100	0	0
	£314	0	0

Thus debtors have the *legal* means of harassing their creditors, without putting themselves to a tenth part of the expenses to which they subject the plaintiff, whose property they have previously run through or squandered !

**MANNER OF MAKING A JUDGE.**—The judges must be selected from the sergeants at law, and the manner in which they are created merits notice. The lord chancellor, having taken his seat in the court where the vacancy is to be filled up, bringing with him the letters patent of creation, causes the sergeant *elect* to be introduced, to whom in open court his lordship notifies the king's pleasure, and afterwards directs the patent to be publicly read. When this has been done, the master of the rolls reads to the new judge the oath he is to take, which states, that he shall indifferently administer justice to all men, as well foes as friends, that shall have any suit or plea before him ; and this he shall not forbear to do, though the king by his letters, or by express word of mouth, should command the contrary ; and that from time to time he shall not receive any fee or pension, or living of any man, but of the king only ; nor any gift, reward, or bribe, of any man having suit or plea before him, saving meat and drink, which shall be of no great value. The oath having been administered, the lord chancellor delivers to the new judge the letters patent of his creation ; and the lord chief justice of the court assigns to him a place on the bench, where he is then placed, and which he is enjoined to keep.

**INNS OF COURT.**—It may not be improper to notice the institutions in which the professors of the law are supposed to be bred ; but they are now only nominally what they were formerly in reality. Instead of any public "moots," exercises and duties, to be observed by students previously to their being privileged to be called to the bar, they have now only to eat a certain number of dinners, during the terms of three or five years, in one of the Inns of Court, the expense of which, together with a

species of fine, amounts to about £130. After having undergone this probationary requisite, the students are qualified for admission to the bar, if they can persuade members of the society to move that they be called, even though the party so recommended had never once seen a law book. There is seldom any objection to the call; it is not however always a matter of course. The celebrated HORNE TOOKE, who studied for the pulpit, the parliament, and the bar, found himself baffled in each of those pursuits; the motion that he be called to the bar, after he had regularly gone his terms, was negatived by a majority of *one*! But although much pleasantry has been occasioned by the practice of thus *eating* the way to the bar, it must not be presumed that no preparatory study is pursued. Public courses of study were found inefficacious, and were abandoned; but all those who have risen to celebrity as lawyers, laid the foundation of their greatness by sheer hard study. The young men not only apply themselves to courses of law reading, but come into the practice of the laws, and the application of their own researches, by being articulated as pupils to leading special pleaders, counsel, &c. Two or three hundred guineas are frequently paid for permission to study in the office of a special pleader, or barrister of high consideration and great practice. The study of the law is a certain road to greatness in the state. The method which lawyers are obliged to pursue in all their studies and pleadings, gives them advantages in public speaking both in parliament and at the bar, over every body else; hence may be traced the amazing success and celebrity that often attends them in life, humble individuals rising to be the first law officers and ministers of the crown.

As a member of the law is obliged to belong to an Inn of court, and as the students and practitioners generally reside in chambers in some of the inns, those courts have become famous for the production of men of learning. The Inns of court are governed by masters, principals, benchers, stewards, &c. They have not any judicial authority over their members. For lighter offences, persons are only excluded, or not allowed to eat at the common table with the rest; and for greater, they lose their chambers; and when once expelled from one society, they are never received by any of the rest. As the societies are not incorporated, they have neither lands nor revenues, nor any thing for defraying the charges of the house, but what is paid for admissions, and other dues for the chambers. The members may be divided into benchers, outer barristers, inner barristers, and students. The benchers are the seniors who have the government of the whole house; and out of these is annually chosen a treasurer, who receives, disburses, and accounts for all the money belonging to the house.

THE TEMPLE.—There are four principal inns of court, the Inner and Middle Temples, Lincoln's Inn, and Gray's Inn. The Temple is so called, because it was anciently the dwelling-house of the Knights Tem-

plars. At the suppression of that order, it was purchased by the professors of the common law, and converted into Inns. They are called the Inner and Middle Temple, in relation to Essex house, which also belonged to the Templars, and is called the Outer Temple, because situated without Temple Bar. The king's treasure was kept in the Middle Temple, during the time of the Templars. The master of the Temple was the chief officer, and was summoned to parliament in the 47, Henry III., and from him the chief master of the Temple church is called "the Master of the Temple."

THE INNER TEMPLE is situated in the east of Middle Temple-gate, and has a cloister, a large garden, and spacious walks. The society consists of benchers, barristers, and students; the former of whom, as governors at commons, have their table at the upper end of the hall, and the barristers and students in the middle.

THE MIDDLE TEMPLE is joined to the Inner Temple on the west, and is thus denominated in consequence of its having been the middle or central part of the ancient Temple or priory of Knights Templars.

LINCOLN'S INN is situated on the west side of Chancery Lane, where the houses of the bishop of Chester and the Black Friars formerly stood; the latter was erected about the year 1292, and the former about 1296; but both of them falling into the possession of Henry Lacey, earl of Lincoln, he built in their place a stately mansion for his city residence. It afterwards reverted to the bishopric of Chichester, and was demised by Robert Sherbourn, bishop of that see, to Mr William Selliard, a student, for a term of years; after the expiration of which, Dr Richard Sampson, his successor, in the year 1536, passed the inheritance thereof to the said Selliard and Eustace his brother; and the latter, in 1579, conveyed the house and gardens in feu to Richard Kingsmill and the rest of the benchers.

GRAY'S INN lies on the north side of Holborn, near the bars, and is so called in consequence of having been formerly the residence of the ancient and noble family of Gray of Wilton, who demised it in the reign of Edward III. to several students of the law. It is, like the other inns of court, inhabited by barristers and students of the law, and also by many gentlemen of independent fortune, who may choose it as an agreeable retirement, or for the pleasure of the walks. The chief ornament of this inn is its spacious garden, which is open to the well-dressed part of the public every day.

Besides these principal inns of court, there are two SERJEANTS' INNS, the one in Fleet Street, and the other in Chancery Lane.

THE INNS OF CHANCERY were probably so called because they were anciently inhabited by such clerks as chiefly studied the forming of writs, which regularly belonged to the Cursitors, who are officers of chancery. The first of these is Thavie's Inn, begun in the reign of Edward III.,

and since purchased by the society of Lincoln's Inn ; Clement's Inn ; Clifford's Inn, formerly the dwelling-house of lord Clifford ; Staple Inn, belonging to the merchants of the staple ; Lion's Inn, anciently a common inn with the sign of the lion ; Furnival's Inn, now handsomely rebuilt, and Barnard's Inn. These were considered as only preparatory schools for younger students ; and many were entered here before they were admitted into the inns of court. They are now chiefly occupied by attorneys and solicitors. They belong, however, to some of the inns of court, who formerly sent barristers annually to read to them.\*

## PROCEEDINGS IN COURTS OF LAW.

HAVING before given a brief sketch of the different Courts of Law in England, it will be proper to take a succinct view of the method of proceeding therein, both in civil actions and criminal cases. The following observations will be restricted to the forms observed in the courts of general jurisdiction ; for if there be any peculiarities in conducting the business in the inferior courts, they being of a local nature, are consequently of little interest or importance to the public. But in general trials are conducted much the same in the lower courts as before the superior tribunals. And we shall here give some observations on,

I. Trials in Civil Actions.—II. Courts of Equity.—III. Punishments.—IV. Homicide.—V. Courts of Criminal Jurisdiction.—VI. Proceedings in Criminal cases.

I. TRIALS IN CIVIL ACTIONS.—The commencement of a civil suit is the *original writ*. When a person has received an injury, and is determined on seeking the remedy provided by law, he sues out from the court of chancery an *original*, or the writ, which is applicable to his particular case. This is directed to the sheriff, requiring him to command the offender to do justice to the party complaining, or to appear in court to answer the accusation against him. The sheriff is bound to make a *return* of the writ, and this should be done on the following term : but as the law allows the defendant *three days'* grace for his appearance, the court does not usually sit for despatch of business till the *fourth* or *appearance* day. The means of compelling the defendant to appear in court is called the *process*, of which the primary step is by giving the party notice, by *summons* to obey the original writ. If the defendant disobey this warning, a *pone* is issued out, or writ of attachment, so called from the words of the

\* Blackstone, Custance, Leigh's Picture of London.

writ, "*pone per vadium et salvos plegios*"—"put by gage and safe pledges, A. B., the defendant, &c."—If he neglect to appear after *attachment*, he is farther compelled by writ of *distringas*, commanding the sheriff to distrain the defendant of his goods if he do not appear. And if he have no goods, then a writ of *capias* is issued, empowering the sheriff to take the defendant's body and bring him into court, on the day of the return to answer the plaintiff's plea. If after repeated writs of *capias* and *proclamation* made, the defendant do not appear and cannot be found, an outlawry takes place. Such outlawry is putting the man out of the protection of the law, and is attended by a forfeiture of all his goods and chattels to the king. But the common practice is to issue the writ of *capias* in the first instance; and the sheriff can only serve the defendant with a copy of the writ, and a written notice to appear by his attorney in court to defend the action. But if the plaintiff make affidavit, that the cause of action amounts to £10 and upwards, then he may arrest the defendant. An *arrest* must be by corporeal seizing or touching the defendant's body; but the bailiff cannot enter his house by violence, but must watch his opportunity to take him. When the defendant is regularly arrested, he must either go to prison or safe custody, or put in *special bail* to the sheriff as security for his appearance. This appearance is effected by putting in bail *to the action*. These bails, who must be at least two in number, must enter into a recognizance in a sum equal, or sometimes double, to that to which the plaintiff has sworn: whereby they undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation or render himself a prisoner, or that they will pay it for him. Such then is the *process* or mode which the law appoints for bringing the defendant into court, to try the suit and abide the issue.

After the process follows the *pleadings*; that is, the plaintiff states a declaration of his case, to which the defendant must in a reasonable time make his defence or put in a *plea*, otherwise the plaintiff will at once recover judgment by default, unless he and the plaintiff can agree to make up the matter.

Pleas are of two sorts; *dilatory* pleas, and pleas *to the action*.

The fourth stage of the action is the *issue*, which is the end of all the proceedings; and is either on a matter of law or matter of fact. The former is called a *demurrer*; which confesses the facts to be true, but denies that any injury is thereby done to the plaintiff. The latter, or an issue of *fact*, is when the fact only is disputed. When he who denies the fact has tendered the issue, both parties are said to join issue, having agreed to rest the fate of the cause upon the decision of a jury of the country; and this brings us to the trial in open court.

A *trial*, then, or *probation*, is the mode which the law of the land has settled for a criterion of truth and falsehood.

In civil cases the law acknowledges seven special trials; viz. 1. by record; 2. by inspection; 3. by certificate; 4. by witnesses; 5. by wager of battel; 6. by wager of law; and 7. by jury.

1. A trial by *record*, is when a matter of record is pleaded in any action; and the defendant pleads that there is no such record existing. Upon this, issue is joined, and the plaintiff is allowed time to produce the said record, and on his failure the defendant shall have judgment to recover. The cases usually tried by record are titles of nobility. Thus, whether such a one be earl or no earl, whether baron or no baron, shall be tried by the king's patent only, which is matter of record.

2. Trial by *inspection*, is when the point or issue is the object of sense; so that the judges upon the testimony of their own senses may decide the question; as in cases of nonage, idiotism, and the like. So also the issue respecting any circumstance relative to a particular day past, may be tried by inspection of the almanac by the court. Thus, an appeal upon a writ of error was once made from an inferior court, at Lynn Regis, assigning the error to be, that the judgment was given on a Sunday: it appearing to have been the 26th February, in the 26th year of the reign of queen Elizabeth. Upon inspecting the almanacs of that year the fact was found to be so; and the judgment was reversed accordingly.

3. The trial by *certificate* is allowed in such cases when the evidence of the person certifying is the only proper criterion of the point in dispute. As if A. B. asserts that he was at Jamaica at such a time, the court may determine the fact upon a certificate under the hand and seal of the governor of that island.

4. The trial by *witnesses*, without the intervention of a jury, is the only method of trial known to the civil law, in which the judge is left to form his sentence in his own breast upon the credit of the witnesses examined. But it is very rarely used in the law of England, which prefers the trial by jury before it in all cases.

5, 6. The trial by *wager of battel*, and by *wager of law*, are both now quite out of use, and therefore need only be mentioned.

7. Trial by jury having been already detailed, page 51, need not be here repeated, but merely to supply what was then omitted. The evidence having been gone through on both sides, the judge proceeds to sum up the whole to the jury, in presence of the parties, their counsel, and all others, in open court. In doing which his lordship observes wherein the main question or principal issue lies; states what evidence has been adduced in it, and gives his opinion to the jury, in matters of law, arising upon that evidence. If the case be not very clear, the jury then retire from the bar to consider of their verdict. They must be kept entirely by themselves, and not suffered to speak to either of the parties, or

their agents ; nor to receive any fresh evidence in private, nor cast lots for whom they shall decide ; as any of these circumstances would invalidate their verdict. And to avoid intemperance, or unnecessary delay, they are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If they should not be agreed before the judges are about to leave the town, they are to be threatened or imprisoned ; yet the judges are not bound to wait for their decision, but may take them from town to town, through the circuit, in a cart, until they can make up their minds.

When the jury are agreed, they return back to the bar ; and before the verdict is delivered, the plaintiff is bound to appear in court by himself, or his attorney, or counsel, in order to answer the amercement to which he is liable if he fail in his suit. If the plaintiff do not appear, he is said to be *non-suit*, and no verdict can be given ; and therefore it is usual for him, when he or his counsel perceive that he has not sufficient evidence to maintain his issue, to be voluntarily *non-suited*. Whereupon the action is ended, and the defendant shall recover his costs. The reason of this practice is, because after a non-suit, the plaintiff may commence an action again ; but after a verdict and judgment against him, he cannot attack the defendant again upon the same grounds.

A *verdict* means to speak truly, by which the jury openly declare to have found for the plaintiff or defendant. A *special verdict* is when the jury simply state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that if upon the whole of the matter, the court shall be of opinion that they find for him ; if otherwise, then they find for the defendant. A *special case* is another species of verdict, when the jury find generally for the plaintiff, subject to the opinion of the judge or court above, on a *special case*, stated by the counsel on both sides, with regard to a matter of law ;—when the verdict is given and recorded in court, the trial is finished, and the jury is to be discharged.

The *judgment* of the court follows the verdict of the jury, but it may be suspended and finally arrested, for it cannot be entered till the next term after trial had, and that upon notice to the other party ; so that if any defect of justice happened at the trial through surprise, inadvertency, or misconduct, the party may have sufficient relief in the court above, by obtaining a new trial ; which is always granted, when the reasons for applying for one are sufficiently weighty.

*Arrests of judgment* arise from *intrinsic* causes appearing on the face of the record. Of this kind are, first, when the declaration varies totally from the original writ ; secondly, when the verdict differs materially from the pleadings or issue thereon ; or, thirdly, if the case laid in the declaration, be not sufficient in point of law on which to found an action.

If, by some of these means, judgment is not arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. But when judgment is arrested, each party pays his own costs.

*Judgments* are not the judge's determinations, but the sentence of the law, and are of four sorts ; first, when the facts are confessed by the parties themselves, and the law is determined by the court : as in the case of judgment on *demurrer* ; secondly, when the law is admitted by the parties, but the facts disputed : as in the case of judgment on a verdict ; thirdly, when both the law and the facts arising thereon are admitted by the defendant : which is the case of judgment by *confession* or *default* ; or, lastly, when the plaintiff is convinced that either fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution ; which is the case in judgments on a *non-suit*, or *retraxit*.

The consequence of judgment is *execution*, which will follow immediately, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings ; and then he has his remedy to reverse them by several writs in the nature of appeals.

The principal method of redress in wrong judgment, by way of appeal, is by a *writ of error* to some superior court. A writ of error for some supposed material mistake, assigned in the proceedings of a court of record, lies, in the last resort, to the house of Lords, whose decision cannot be reversed, or even reviewed. When judgment has not been suspended, superseded, nor reversed, *execution* follows, or the law is put in force, according to the nature of the action. The different writs of execution must be sued out within a year and a day after judgment is entered : otherwise the court concludes that the judgment is satisfied and extinct ; yet the defendant may be compelled to show cause why the judgment should not be revived, &c.

II. COURTS OF EQUITY.—Although there is some difference with regard to the forms of practice adopted in the court of Chancery, and the equity court of Exchequer, yet the same system of redress is pursued in each.

*Equity*, in its true and genuine import, is the soul and spirit of all law. Positive law is construed, and rational law is made by it. Nothing more is intended by equity than the sound interpretation of the law : the words of the law itself may, and often are too general, too special, or otherwise defective. In such cases, it is the province of equity to expound their true meaning. However the courts of law and of equity may differ in their outward forms, they rest upon the same substantial foundation. Their proceedings are dissimilar in their mode of proof, the mode of trial, and the mode of relief. But the essential difference between them consists in the different modes of administering justice in each.

With respect to the mode of *proof* : where facts, or their leading circumstances, depend only on the knowledge of the party, a court of equity ap-



plies itself to his *conscience*; and purges him upon oath with regard to the transaction. The truth being hereby once discovered, the judgment is the same in equity as it would have been had the same facts appeared in a court of law. The mode of *trial* in courts of equity is by interrogatories, administered to the witnesses; upon which their depositions are taken in writing, wherever they happen to reside. If, therefore, the cause arise in a foreign country, and the witnesses live on the spot; if in cases arising in England the witnesses are abroad, or soon to leave the kingdom; or if witnesses residing at home are aged and infirm: a court of equity may and will grant a commission to examine them.

As to the mode of *relief*: the want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great many instances, as in executing agreements, which a court of equity will cause to be carried into strict execution, instead of giving damages for their non-performance. And in other instances, a more extensive and specific relief may be had in courts of equity than can be obtained in courts of law.

A suit in Chancery commences by preferring a bill to the lord chancellor in the style of a petition, "humbly complaining, sheweth to your lordship, your orator A. B. that," &c. setting forth the circumstances of the case at length, as some fraud, trust, or hardship; "in tender consideration whereof, and for that your orator is wholly without remedy at the common law;" relief is therefore prayed for at the chancellor's hand, and also a process of *subpœna* against the defendant to compel him to answer upon oath, to all matter charged in the bill, &c. The bill preferred must be signed by counsel as a certificate of decency and propriety. When the bill is filed, process of *subpœna* is taken out, commanding the defendant to appear and answer to the bill on pain of the forfeiture of £100; and if he do not appear within the time limited by the rules of the court, he is then said to be in *contempt*: the consequence of which is an *attachment*. This is a writ in the name of a *capias* directed to the sheriff, commanding him to attach or take up the defendant, and bring him into court. If the sheriff should return that the defendant *non est inventus*, that is, was not found, then an *attachment with proclamations* issues,—which enjoins the sheriff to cause proclamations to be made throughout the county, to summon the defendant upon his allegiance, personally to appear and answer. If this writ should also be returned with a *non est inventus*, a commission of rebellion is awarded against him for not obeying the king's proclamations, according to his allegiance; and four commissioners, therein named, or any of these, are ordered to attach him wherever they find him, as a rebel to the king's government. If, notwithstanding, a *non est inventus* be still returned, the court sends a *sergeant at arms* in quest of him. And if he elude the search of the sergeant also, then a *sequestration* issues to seize

all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. After an order of sequestration is issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. And thus much if the defendant abscond. But if the defendant be taken in any stage of the process, he is transmitted to the Fleet, or other prison, till he put in his appearance, or answer, or perform whatever else this process is issued to enforce. He must also clear his contempts by paying the costs which the plaintiff has thereby incurred.

If the defendant should be a *body corporate*, the process is by *distringas* to distrain them of their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. But if the defendant should be a peer of the realm, the lord chancellor sends a copy of the bill together with a *letter missive* to him, requesting his appearance. If he neglect to appear, he may be served with a *subpœna*; and if he still continue in contempt, a sequestration issues out immediately against his lands and goods. The same process is pursued against a member of the house of commons, except only that the lord chancellor does not send his letter missive to him. Should the defendant appear regularly and take a copy of the bill, he is then to *demur*, *plead*, or *answer*.

A *demurrer* in equity is nearly of the same nature as a *demurrer* in law. It is an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill. If the demurrer be overruled, the defendant is ordered to answer. A *plea* may be either to the jurisdiction, showing that the court has no cognizance of the cause; or to the *person*, showing some disability in the plaintiff; as by outlawry, excommunication, and the like; or it is in *bar*, showing some matter, whereof the plaintiff can demand no relief. An *answer* in equity courts is the most usual defence that is made to the plaintiff's bill. It is given in on the oath of a commoner, or the honour of a peer or peeress. But when these are amicable defendants, their answer is usually taken without oath, by the plaintiff's consent. If the defendant live within twenty miles of London, his answer must be obtained by swearing him before one of the masters of the court; if he reside farther off, there may be a commission to take his answer in the country, where the commissioners administer to him the usual oath. The answer being then sealed up, is carried by one of the commissioners up to the court, or is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. The answer must be signed by counsel, and must either deny or confess all the material parts of the bill, or it may confess and avoid; that is, justify or palliate the facts. If none of this be done, the answer may be objected to as insufficient, and the defendant be compelled to put in a more satisfactory one. In his answer the defendant may pray to be dismissed the court; but if he have any relief to

pray against the plaintiff, he must do it by an original bill of his own, called a *cross bill*. After an answer is put in, the plaintiff upon payment of costs, may amend his bill; either by adding new parties or new matter; and the defendant is obliged to answer afresh to such amended bill.

If the plaintiff now find sufficient matter confessed in the defendant's answer on which to ground a decree, he may proceed to the hearing of the cause, upon bill and answer only;—but in that case, he must take the defendant's answer to be true in every point. Should this not be the case, the plaintiff is then to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be the reverse; which he is ready to prove as the court shall award. Upon which the defendant rejoins, averring the like on his side, which is *joining issue* upon the disputed facts. The next step is to prove these facts; which is done by examining witnesses, and taking their depositions in writing. The witnesses near London are examined at an office appointed, and those in the country by commissioners. When all the witnesses are examined, the depositions may be published. After which they are open for the inspection of all the parties, and copies may be taken. The cause is now ripe to be set down for *hearing*; which may be done at the procurement of the plaintiff or defendant, either before the lord chancellor or the master of the rolls, according to the direction of the clerk in court, the nature of the suit, and the arrival of causes depending before each. The decrees of the master of the rolls are valid, but subject to be discharged or altered by the chancellor, and cannot be enrolled till they are signed by his lordship.

The method of hearing causes in court is this: the parties on both sides appearing by their counsel, the plaintiff's bill is first opened, and the defendant's also by the junior counsel on each side. After which the plaintiff's leading counsel states the case, the matters in issue, and the points of equity thereon arising. Then such depositions as are called for by the plaintiff are read by one of the six clerks; and the plaintiff may also read any part of the defendant's answer, and after this, the rest of his counsel proceed to make their observations and arguments. The defendant's counsel then goes through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. The court then pronounces the decree, adjusting every point in debate according to *equity* and good conscience. If either party think himself injured by the decree, he may petition the court for a *re-hearing*; but the petition must be signed by two respectable counsel, certifying that it is their opinion, that the cause is proper to be reheard. But after the decree is once signed and enrolled, it cannot be reheard or rectified, but by a bill of review or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment appearing upon the face of the decree; or by special leave of the court, upon

oath made of the discovery of new matters or evidence which could not be possibly had or used at the time when the decree passed. But the dernier resort of the party who thinks himself aggrieved, is an appeal to the house of lords. This is effected by petition to that high court, and not by *writ of error*. But no new evidence is admitted in the house of lords, upon any account.

III. PUNISHMENT.—It may not be uninteresting now to inquire into the nature of crimes and their punishment. In the preceding article, those offences have been considered which arise between man and man : we shall now consider the *criminal law* or *pleas of the crown*. The king is the proper prosecutor for every offence, because as he is the sovereign and head of all estates and classes in the nation, he is supposed to be personally injured when any of the great family of which he is the head and father personally suffers.

A *crime* is an act either committed or omitted in breach of a public law, which either forbids or commands it.

A *misdeemeanor* is a term of a milder import, and signifies any indictable offence which does not amount to felony ; such as perjury, battery, libels, conspiracies, &c.

Laws are necessarily enacted for the good government and security of the state, and for the punishment of those who commit any crime ; and as the king enacts these laws by the advice and consent of his great council, the three estates of parliament, it follows as a matter of course, that he is armed with the power of enforcing them. “ He beareth not the sword in vain ; for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil.” Rom. xiii. Punishments have been devised, denounced, and inflicted by human laws in consequence of the disobedience of those who have been guilty of such outrages, as, if permitted with impunity, would soon loosen all the bands of society. But there is no law, human or divine, which empowers private individuals or parties, being subjects, to assume at their own hands the right of executing justice, either “ between plea and plea, or stroke and stroke,” inasmuch as the divine right of demanding blood for blood was conferred by God on Noah, as the universal sovereign and his sons : and from them naturally descending, as an undoubted prerogative of their crown, on all sovereign princes, and who have in consequence exercised this right in all ages, both civilized and barbarous, to the entire prevention of the *people* assuming to themselves the privilege of avenging their own quarrels, far less of executing public justice, and which in no age or country has ever been disputed.

Human punishment may be considered with regard to its power, end, and measure.

With respect to the *power* or right of the sovereign to inflict punishment ; every one must at once see the mischief that would arise, if men were

allowed to redress their own grievances. But no man being a proper judge in his own case, the power of enacting punishment is, with the strictest justice and the unerring wisdom of God, transferred from individuals to the sovereign authority. This power was conferred on Adam at his creation, but more distinctly on Noah after the flood. We find Noah exercising the fatherly or sovereign authority over his wicked son : “ and he said, Cursed be Canaan, a servant of servants shall he be unto his brethren.” But his dutiful and obedient children he blessed : “ and he said, Blessed be the Lord God of Shem ; and Canaan shall be his servant. God shall enlarge Japheth ; and Canaan shall be his servant.”\* Here we see the universal sovereign exercising the supreme authority, cursing Ham or Canaan for his irreverence and impiety, and blessing the other two for their respectful and dutiful conduct.—God said to Noah and his sons, “ Whoso sheddeth man’s blood, by man shall his blood be shed.”† From the general import of these words, and because Noah’s sons were joined with him in this commission it has been attempted to be explained away, that this command was given to mankind in general, and not to the sovereign in particular ; which makes nonsense of a very solemn and important divine gift : for in that case, any one of Noah’s sons had the power of life and death over their father and sovereign, as well as he over them, which would be complete confusion ; there could not then be any judge, because every man would be a judge over his judge ! It was a command of obedience to the sons, that was to extend to all generations to the end of the world, and had respect to Noah’s sons when they themselves should become sovereigns, in the course of succession to their father’s power and authority ; whereas, had the commission been given to Noah alone, without associating his sons with him, it might have been construed into a particular grant to him alone, and not to be descendible to other governors after him ; therefore the commission is in general terms, “ by man shall his blood be shed,” that is, by such men, to the end of the world, who shall be justly vested with sovereign authority. These men, Shem, Ham, and Japheth, were well certified of their father’s authority over them ; it was no new thing to them, it had been established from the beginning, as well by the positive institution of God, as by the dictates of nature : and, therefore, it being manifest that Noah had no superior but God only, his authority must have been supreme and absolute over his sons, who were his subjects ; and it must follow that the power of life and death was to be executed by Noah over his sons and their children after them, who all constituted his subjects ; and whoever inherited his power and authority, inherited likewise the power of life and death conferred on him by God himself, and which through him is inherent in every lawful sovereign, to the end of the world. And the words of the Mosaic law are very emphatical

\* Genesis ix. 25, 26, 27.

† Ibid, ix. 6.

in prohibiting the pardon of murderers: "Moreover, ye shall take no satisfaction for the life of a murderer who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it."\*

With regard to the particular *mode* of punishment which may be thought best calculated to defend every individual in his civil capacity from injury, *that* must be left to the wisdom of the legislature of every country. And it is in vain for any criminal to say, that this or that penalty is too severe for his crime; for it is a maxim of the constitution, that every man consents expressly or impliedly to all the acts of the legislature. The criminal code is, therefore, a constituent part of that original contract into which every man enters when he first becomes a member of society; it was intended, and continued to contribute to his personal safety and happiness, till his own folly brought down its terrible vengeance on his head. As to the *end* of human punishment: it is not inflicted by way of *revenge*: for that would be to usurp the prerogative of God, to whom alone *vengeance* belongeth; "vengeance is mine, I will repay, saith the Lord." Neither is it awarded to make an *atonement*. For every wilful violation of human laws that are contrary to revelation, is a breach of the moral law; and no human suffering can remove the guilt of the offender, or make *whole* the law which he has broken. Suffering is the *effect* of transgression, and it is absolutely impossible that an effect should destroy the cause which produced it: for instance, no length of confinement of a debtor, will discharge the debt which he owes. In short, it is from the scriptures alone that we learn how sin can be pardoned, consistently with the divine attributes and government. "Therefore," says St Paul, "by the deeds of the law there shall no flesh be justified in his sight; for by the law is the knowledge of sin. But now the righteousness of God without the law is manifested, being witnessed by the law and the prophets; even the righteousness of God, which is by faith of Jesus Christ unto all and upon all them that believe, for there is no difference; for all have sinned and come short of the glory of God. Being justified freely by his grace through the redemption that is in Christ Jesus; whom God has set forth to be a propitiation through faith in his blood, to declare his righteousness for the remission of sins that are past, through the forbearance of God."†

The sole design, then, of the legislature in enacting punishments is to prevent in others the commission of the same crimes in future. This is effected in three ways; either by amendment of the offender himself, in suffering corporeal punishments, such as exile, fines, imprisonment, and the like; or by deterring of others by the dread of example, which gives rise to all open and ignominious punishments; or by depriving the criminal of the

\* Numbers xxxv. 31, 33.

† Romans iii. 20—25.

power of doing farther mischief, which is accomplished either by death, perpetual imprisonment, or banishment for life. The *measure* of human punishments must be left to the wisdom and discretion of the legislature, to enact such penalties as are warranted by the laws of nature and of society. They should be such as seem best adapted to answer the end of prevention, and not of a vindictive nature. The law of *retaliation* is not a proper mode of punishment ; because in various instances it would be more than a compensation ; as if a court would award a strong man to strike a weak man who had struck him : again, in some cases it would be inadequate to the offence ; as if a man were sentenced to lose one of his eyes, who had put out his neighbour's *only* eye. In other instances it is impossible to apply it ; as in the case of theft, defamation, forgery, &c.

There are, however, some general principles to be regarded in allotting a punishment which shall be adequate to the offence. It is necessary to attend to the object of an injury ; to the violence of passion or temptation under which it was committed, to the age, education, and character of the offender ; with a variety of other circumstances which may extenuate or aggravate the commission of a crime ; and must point out the measure of punishment. As therefore punishments are intended for the prevention of future crimes, it follows that those offences should be most severely punished, which are most destructive of the public safety and happiness, and which a man has the most frequent and easy opportunities of committing. Hence, it is in more cases capital for a servant to rob his master than for a stranger. To steal any trifle from one's person *privately*, of the value of *twelve pence*, is made capital ; but to carry off a load of corn from an open field is punished only with transportation.—Unreasonable severity in the punishment of crimes, is thought by many wise and good men to defeat its own end. They are of opinion that crimes are more effectually prevented by the *certainly* than by the *severity* of the punishment ; because, when the severity of the law is very great, their execution is hindered by public humanity. A feeling man will decline to prosecute, when he thinks the conviction would be followed by excessive punishment ; and a merciful prince, influenced by similar motives, will be often constrained to pardon the criminal, or dispense with a part of the sentence of the law.

IV. HOMICIDE.—It does not fall within the limits of this work to give a specification of all the crimes of which the fallen nature of man is guilty, and for which the laws of every well-governed realm has provided just and salutary punishments. The greatest crime that can possibly be committed against the *persons* of any of the king's liege subjects, is the wilful taking away of that life which is the immediate gift of God. No man has even the authority to destroy his own life, much less has he the privilege of depriving his neighbour of his : except under certain circumstances ; when he is either permitted or commanded to do so, by the laws

of nature or of revelation. But as the best action may be debased by the unworthy motives from which it originated ; so even the killing of a fellow creature may be altogether an innocent act, if there be a total absence of all malicious intention or premeditated design. And in such cases, under the Jewish dispensation, the divine law provided an expiation. " If one be found slain in the land which the Lord thy God giveth thee to possess it, lying in the field, and it be not known unto thee who hath slain him. Then thy elders and thy judges shall come forth, and they shall measure unto thee the cities which are round about him that is slain : and it shall be, that the city which is next unto the slain man, even the elders of that city shall take an heifer that hath not been wrought with, and which hath not drawn in the yoke : and the elders of that city shall bring down the heifer into a rough valley, which is neither eared nor sown, and shall strike off the heifer's neck there in the valley : and the priests, the sons of Levi, shall come near : (for them the Lord thy God hath chosen to minister unto him, and to bless in the name of the Lord :) and by their word shall every controversy and every stroke be tried : and all the elders of that city that are next unto the slain man, shall wash their hands over the heifer that is beheaded in the valley : and they shall answer and say, our hands have not shed this blood, neither hath our eyes seen it : be merciful, O Lord, unto thy people Israel, whom thou hast redeemed, and lay not innocent blood unto thy people of Israel's charge. And the blood shall be forgiven them."\*

The laws of England, therefore, with their usual regard to reason and revelation, very properly contemplate homicide in three points of view ; 1. Justifiable : 2. excusable : and 3. felonious.

1. Justifiable homicide is of various kinds ; it may be such as arises from some unavoidable *necessity*, without the consent of the will of the perpetrator, who is therefore without any blame : as, when the *law requires* it, one, by virtue of his office, puts another to death, who had forfeited his life by the laws and verdict of his country. This is an act not only of necessity but of duty ; and is therefore not only justifiable but commendable when the law requires it. But the law *must require* it, otherwise it is neither justifiable nor commendable : therefore, wantonly to kill the greatest malefactor, an attainted or outlawed felon or traitor, with deliberation, uncompelled and extra-judicially, is murder. And further, if judgment of death be given by a judge unauthorized by a lawful commission, and execution be done accordingly, the judge is guilty of murder. And on this account, although Sir Matthew Hale accepted the place of a judge of the common pleas under Cromwell's government, yet he declined to sit on the crown side at the assizes and try cases of life and death.

\* Deut. xxi. 1—8.



And his reason was, that, Cromwell being a usurper, he could not give a valid commission ; and, therefore, executions under his authority were cases of murder : but as disputes concerning civil property must be decided in the worst of times, he acted as a judge in civil cases during the whole of the usurpation. Also judgment, when legal, must be executed by the proper officer or his appointed deputy ; and if another person do it of his own accord, even though it be the judge himself, it is held to be murder. And farther, it must be done agreeably to the sentence of the court ; for if an executioner beheads one who is adjudged to be hanged, or *vice versa*, it is murder ; because he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law. Again, homicide is justifiable when it is committed to advance the public justice ; as when an officer in the execution of his office, either in a civil or a criminal case, kills a man who resists him. So, likewise, if a man is killed in attempting to commit a robbery, or in breaking open a house in the *night-time*, the slayer only commits a justifiable homicide, and the law considers that he has done a commendable rather than a blamable act. Indeed it is a constitutional maxim that one may lawfully kill another who forcibly attempts to commit any crime that is punishable with death. The law justifies a woman who kills one in an attempt to ravish her ; also a husband or father, if he kills a man who attempts to commit a rape on his wife or daughter, but not if he detects them in adultery by the female's consent, because the first is forcible and felonious, but the latter is not.

2. Excusable homicide is of two sorts ; either by misadventure or upon a principle of self defence. Homicide by *misadventure*, is when one in doing a lawful act kills another without any intention of hurting him. As if a parent or a master or an officer, in *moderately* correcting a child, apprentice, or soldier, should happen to occasion his death, it is only a *misadventure*, because *moderate* correction is a lawful act. But neither the manner nor instrument, nor measure of the correction must exceed the bounds of *moderation* and reason ; otherwise, if death ensue, it will be murder, or manslaughter at the least, according to circumstances. A tilt or tournament, the martial diversion of our warlike ancestors, was an unlawful act ; and so are boxing and fencing, the succeeding amusements of their posterity ; and therefore, in the former case if a knight, or in the latter a pugilist or fencer, should kill his antagonist, such killing is felony or manslaughter. But if the king either command or permit such diversion, it is then only a misdemeanour, because the act is lawful. To whip another's horse whereby he runs over a child and kills him, is held to be an accident in the rider, because he had not done any unlawful act ; but it is manslaughter in the person who whipped the horse, because the whipping was a trespass and at best a piece of idleness of inevitably dangerous consequence. And, in general, it is manslaughter and

not misadventure only, if death ensues in consequence of any idle, dangerous, and unlawful sports, such as shooting or casting stones in a town ; because these are unlawful acts. Homicide in *self-defence* is that whereby a man, by killing his assailant, may protect himself from assault in the course of a sudden quarrel. This is what in law is termed *chance medley*, or a *casual* affray. But if both parties be actually combating at the time the mortal stroke is given, then the slayer is guilty of manslaughter ; but if the slayer has not begun the fight, or, having begun, endeavours to decline any further struggle, but afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this homicide is excusable by self-defence. The law requires in this case that the slayer should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant. To constitute a homicide in *self-defence*, therefore, it must appear that the slayer had no other possible means of saving his own life but by killing his antagonist.

3. Felonious homicide is the killing of any human creature without justification or excuse ; which may be done either by destroying *one's self* or another person.

A *felo de se*, or self-murderer, is one who deliberately puts an end to his own life, or commits any *unlawful* act which may occasion his own death : as if, in maliciously shooting at another person, the gun bursts and kills himself. Suicide admits of accessories ; as if one persuades another to kill himself, and he does so, the adviser is guilty of murder.

Wilful, deliberate suicide, is the most heinous crime which a man can commit : for no man has a right to anticipate the call of God, or to bereave the public of a member by destroying himself. Every person who knowingly and wilfully destroys his own life is guilty of murder ; for God only who gave us our life has a right to take it away ; and by consequence, every man who offers violence to his own life, manifestly invades the prerogatives and usurps the rights and authority of God. And the same rebellious act by which he invades the prerogatives of the Almighty, instantly cuts him off from all possibility of repentance, and hurries him uncalled before his offended Creator and Judge.

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“ Dreadful attempt !  
 Just rushing from self-slaughter, in a rage  
 To rush into the presence of our Judge ;  
 As if we challenged him to do his worst,  
 And matter'd not his wrath.”—*Blair's Grave.*

Men of loose principles have always entertained false notions of liberty, honour, and courage. We learn, both from the laws of God and man, that suicide is an abhorred practice, and whatever pretensions it makes to honour and courage, it is but cowardice, fear, and the mark of a poor spirit

that sinks under the common calamities and ills of this life : a deed to be abhorred and condemned with all our zeal ; to be guarded against with our utmost care, reason, and religion, by walking in all the commandments of God blameless, and pouring out our prayers for his preventing and restraining grace, that his fear may ever be before us, and that we may never be tempted above what we are able to bear, nor that such a dreadful impiety may ever overcome us. A Christian who believes that the wrath of God is revealed against all unrighteousness ; that without repentance no sins will be forgiven ; that after death there can be no repentance : that such a man—professing the faith of Christ crucified, and having covenanted with God in baptism to take up the cross and bear it, if need be, unto death—should, in the impatience of his soul when pressed by some calamity, deliberately choose to throw off his burden by committing a sin of which he knows he can never repent, but must venture the consequences to all eternity, is what nobody could believe, if its too frequent practice did not convince us that such desperate madness may be committed. When a man falls into this melancholy resolution, he yields to his unrestrained passions ; so that when great accidents happen, or “ evil days come,” he has no stay or support, and his pride will not submit to bear the loss nor fall from his former condition, but he abandons himself to despair of God’s mercy, which is of itself a great crime : but neither poverty nor bodily afflictions, are so hard to bear as the shame, reproach, and infamy of so woeful a death is to surviving relations, who are tormented with perplexing doubts and fears concerning the future condition of the suicide.

But suicide is also a crime against the king, who has an interest in the life of every one of his subjects. The law of England has annexed such punishment to this horrid crime as the nature of the case admits. To affect the former, therefore, the law directed that the *dead* body should have an ignominious burial, by being interred in the king’s highway with a stake driven through it : by a recent act, however, of the legislature, this part of the punishment is now repealed. And with respect to his property : all his goods and chattels shall be forfeited to the king. The end and intention of the law in inflicting this degradation and confiscation, so well calculated to restrain a man who regards his own character or the interests of his family, from committing so dreadful a crime, is almost wholly defeated by the too common practice of coroners’ juries in returning verdicts of *lunacy* ; when perhaps the evidence may be far from justifying such a decision. Before a jury gives a verdict of lunacy, they should well consider, whether, if the deceased had in the same frame of mind killed another person instead of himself, the evidence before them would have *obliged* them to acquit him of *wilful murder*. It is indeed a common notion, that none but a *madman* would destroy himself ; but surely this sort of reasoning is very absurd : for is not the drunkard mad,

who wastes his time and property wholly stupifying his senses and enervating his body, and thereby commits a sort of lingering suicide : who, although he is positively assured that no drunkard *can* enter into the kingdom of heaven, still deliberately persists in his sin ? Is not the adulterer also mad, who, in defiance of the plainest and most frequently repeated command of the Almighty, and under the denunciation of a *curse*, defiles his neighbour's bed, notwithstanding the alarming menace, "that whore-mongers and adulterers God will judge?" Yet who ever thinks of excusing or extenuating either on the score of insanity ? A mistaken tenderness for the relatives of the suicide, and an unwillingness to deprive them of his property by their verdict, frequently, no doubt, bias both the coroner and the jury. But they have nothing to do with consequences, and no consideration ought to come in competition with the solemn obligation of their oath ; which requires the jury to give a verdict according to the evidence.

The other species of criminal homicide, is that of killing another person, which is divided into *manslaughter* and *murder*.

*Manslaughter* is defined to be "the unlawful killing of another without malice either expressed or implied : which may be either voluntarily, on a sudden heat ; or involuntarily, but in the commission of an unlawful act."

If on a sudden quarrel two persons fight, and one of them kills the other ; or if on such an occasion they go out into the field and fight, this being one continued act, the killing is *voluntary* manslaughter. But if in either case there be sufficient *cooling* time, for the passions to subside, and reason to interpose, and the person provoked afterwards kills his adversary, then he is guilty of murder. If two men deliberately agree to fight for a wager, and one of them kills the other, it is murder ; because the act of going out to fight for a wager, is in itself unlawful. Yet, in contempt of all law, the debasing custom of pugilism is daily practised. Even the magistracy itself is openly insulted, by the previous notice of these murderous combats which is given in the public newspapers ; the editors of which, by disgracing their columns with the minute details, give a lamentable proof of the vitiated taste of the public, and thus prostitute the liberty of the press to the injury of public morals. Pugilism is a science which might have been very suitable in a Roman amphitheatre before heathen spectators, but is inconsistent with Christian morality. The laws are sufficient to restrain these offenders, were there not a culpable remissness in enforcing them. In the year 1808, the magistrates of the county of Cambridge very laudably passed certain resolutions at the Christmas sessions to prevent prize fighting ; and Mr Justice Grose, in his charge to the grand jury the following Lent assizes, highly commended their conduct, and called upon the public in general to assist their endeavours : and farther observed, that if after such notice any person should abet

such practices, they would on conviction be liable to twelve months' imprisonment.

*Involuntary* manslaughter differs from homicide excusable by misadventure. The latter always happens in consequence of a lawful act; but the former, in the commission of one that is unlawful. The crime of manslaughter amounts to felony, and the offender is punished by fine and forfeiture of all his goods and chattels.

The legal definition of the horrid crime of *murder* is, "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either expressed or implied."

Unlawful killing may take place by poisoning, starving, striking, drowning, or by any other means by which death may be wilfully inflicted on a human creature. A man may be guilty of murder although he neither strike a blow nor primarily intend the death of another; as if a parish officer should shift a pauper from parish to parish, till he dies from want of food and proper care. But to constitute any killing, murder, it is necessary that the party die within a year and a day after the cause of the death was administered. The grand criterion, however, which distinguishes murder from all other killing, is that the killing must be committed with *malice aforethought*; and this in law may either be express or implied. Besides, those who entice others to drinking or other excesses which bring on diseases, and, by weakening the body, not only deprive them of health, the most valuable comfort of life, but by these means hasten their death, cannot hope that God will hold them guiltless of blood. When a person does an act, in itself lawful, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street, and a man is thereby killed, it may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done; if it were in a country village, where there are few passengers, and he calls out to all people to have a care, it is only a misadventure; but if it were in London, or any other populous town, where people are continually passing, it is manslaughter, even although he does give warning; and if he knows of people passing, and gives no warning at all, then it is murder, being esteemed malice against all mankind. And whoever excites or prompts another to such a pitch of anger and revenge, or blows the coals of dissension between others, should it end in murder, cannot be free of that commandment which says, *THOU SHALT NOT KILL*.

"First envy, eldest born of hell, imbrued  
Her hands in blood, and taught the sons of men  
To make a death which nature never made  
And God abhorr'd; with violence rude to break  
The thread of life ere half its length was run,

And rob a wretched brother of his being.  
 With joy ambition saw, and soon improved  
 The execrable deed. 'Twas not enough  
 By subtle fraud to snatch a single life;  
 Puny impety! whole kingdoms fell  
 To sate the lust of power: more horrid still,  
 The foulest stain and scandal of our nature,  
 Became its boast. One murder made a villain;  
 Millions a hero."

*Express malice* is when one kills another with deliberate design; which design is evidenced by some overt act; as lying in wait, antecedent threats, former grudges, and concerted schemes to accomplish his diabolical purpose. Our Saviour and his apostles expressly applies the sixth commandment to our *words* and *secret intentions*, and to the several degrees of causeless anger which break out into contumelious and reproachful language: and St John assures us that whosoever *hateth* his brother is a murderer, and "ye know," says he, "that a murderer hath no eternal life abiding in him." But above all, our Saviour said, that "whosoever is angry with his brother without a cause, shall be in danger of the judgment; and whosoever shall say to his brother Raca, shall be in danger of the council; but whosoever shall say, Thou fool, shall be in danger of hell fire."\*

Deliberate duelling is an open breach of this commandment, and falls under the description of *express malice*. And the law of England has justly fixed the crime and punishment of murder on both the principals and accessories of this unchristian practice: for the plea of self-preservation is utterly foreign to the conditions and circumstances of the man who formally either gives or accepts a challenge; and he adds to the sin of attempting to take away his neighbour's life, by throwing himself into the utmost peril of losing his own—both body and soul. For those who are killed in such engagements, go into the intermediate state, not only void of charity, but enflamed with malice and revenge, or at least with anger and fury; and when these qualities are the last possessors of their souls, with what society of spirits are they qualified to associate in the next world? But the same firmness and integrity, on the trial of a duelist, which so eminently distinguish an English jury upon all other occasions, would soon put a stop to this violation of all law, human and divine. Perhaps it will be asked, what are *men of honour* to do, if they must not appeal to arms? The answer is obvious, if one gentleman have offended another—he cannot give a more indisputable proof of genuine courage, than by making a frank acknowledgment of his fault, and asking forgiveness of the injured party; and, on the other hand, if he has received an affront, he ought as freely to forgive as he hopes to be forgiven of God. Still, it may be urged that a naval or military officer, at least, must not decline a

\* St Matt. v. 22.

challenge, if he would maintain the character of a man of courage. But it is insulting the loyalty and good sense of the brave defenders of our laws, even to imagine that they, of all men, must violate them to preserve their honour ; since the king has expressly forbidden any military man, on pain of being cashiered, if an officer, and of suffering corporeal punishment, if a non-commissioned officer or private soldier. Nor ought any officer or soldier to upbraid another for refusing a challenge, when his majesty declares that *he* considers such as having only acted in obedience to his royal orders, and fully acquits him of any disgrace that may be attached to his conduct.\*

It is also murder by *express* malice, if a master or teacher, on a sudden provocation, beat his servant or scholar in a cruel and unusual manner, so that he dies, although the offender did not intend his death ; because such cruelty indicates malignity of heart. Or if a master refuses an apprentice necessary food or sustenance, or treats him with such continued harshness and severity as occasions his death, the law will apply malice, and the offence will be murder. *Implied* malice is when one man wilfully poisons another. In this case the law presumes that such a deliberate act could arise only from malice, although no particular enmity can be proved. So also if one, knowing the authority of an officer of justice, kills him in the execution of his office, the law will imply malice, and consider the slayer guilty of murder. If even on a sudden provocation one man beats another in a cruel and unusual manner, so that he dies, although he did not intend his death ; yet he is guilty of murder by express malice, that is, by an express evil design. As when a park keeper tied a boy that was stealing wood to a horse's tail and dragged him along the park, when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died : these were justly held to be murders ; because the correction being excessive, it must have proceeded from a bad heart, and was equivalent to a deliberate act of slaughter.

To dismember, maim, or deface our neighbour's person must also be considered as a breach of this commandment, if wilfully committed. The judgment of God has abundantly declared the guilt of such practices in one of the slightest of these instances, the case of a bond-servant or slave ; if the master had the cruelty to strike out a tooth, its penalty was the servant's emancipation from slavery. Besides, these outrages may have a natural tendency to the death of the party, which frequently follows, or to disable the sufferer from afterwards gaining his bread, which eventually may prove a more lingering and tormenting death. The late lord Ellenborough, lord chief justice of the king's bench, introduced a bill into parliament in the year 1803, in order to prevent this crime, and which received the royal

\* Art of War, sec. vii.

assent on the 24th June that year ; it is the 57 of George III. as follows :

“ An act for the further prevention of malicious shooting, and attempting to discharge loaded fire-arms, stabbing, cutting, wounding, poisoning, and the malicious using of means to procure the miscarriage of women ; and also the malicious setting fire to buildings : and also for repealing the act of king James I. entituled, ‘ an act to prevent the destroying and murdering of bastard children,’ and to make provisions in lieu thereof.

“ I. Whereas, divers cruel and barbarous murders have been of late barbarously and wickedly committed in divers parts of England and Ireland, upon the persons of divers of his majesty’s subjects, either with an intent to murder, or rob, or to maim, disfigure, or disable, or to do other grievous bodily harm to such subjects : and, whereas, the provisions now by law made for the prevention of such offences, have been found ineffectual for that purpose : and whereas, certain other heinous offences committed, with intent to destroy the lives of his majesty’s subjects by poison, or with intent to procure the miscarriage of women, or with intent by burning to destroy or injure the buildings and other property of his majesty’s subjects, or to prejudice persons who have become insurers of, or upon the same, have been of late also frequently committed, but no adequate means have been hitherto provided for the prevention and punishment of such offences: Be it therefore enacted, &c., That if any person or persons shall, in either England or Ireland, wilfully, maliciously, and unlawfully shoot at any of his majesty’s subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his majesty’s subjects, and attempt by drawing a trigger, or in any other manner, to discharge the same at his or their persons, or shall wilfully, &c. stab or cut any of his majesty’s subjects, with intent in so doing, or by means thereof, to murder or rob, or to maim, disfigure, or disable such of his majesty’s subjects with intent to obstruct, resist, or prevent the lawful apprehension of such persons, or his, her, or their accomplices, for any offences for which they may be liable to be apprehended : or shall wilfully, &c. administer or cause to be administered any deadly poison, or other noxious and destructive substance or thing, with intent to murder, or to cause and procure the miscarriage of any woman then being quick with child ; or shall wilfully, &c. set fire to any house, barn, granary, hop-oast, malt-house, stable, coach-house, out-house, mill, warehouse, or shop, which shall then be in the possession of the person himself, or of any other person or body corporate, with intention to injure or defraud any person or body corporate ; that then and in any such case, the persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be declared felons, and shall suffer death without benefit of clergy.\* Provided

\* Benefit of clergy has been since that time abolished.



that in case it shall appear on their trial, that such acts of stabbing or cutting were committed under such circumstances as that, if death had ensued thereupon, the same would not in law have amounted to the crime of murder, that then and in every such case, such persons shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted.

“II. If any person or persons shall wilfully and maliciously administer any medicine, drug, or other substance or thing whatsoever, or employ or cause to be employed any instrument or means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not proved to be quick with child at the time; such persons, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be declared guilty of felony, and shall be liable to be fined, imprisoned, set in the pillory, publicly or privately whipt, or to suffer one or more of said punishments, or to be transported for any term not exceeding fourteen years, at the discretion of the court.

“III. The two acts for preventing the murdering of bastards in England and Ireland are hereby repealed; and women charged with the murder of any issue of their bodies, male or female, which if born alive would be by law bastard, shall proceed and be governed by the like rules of evidence and presumption as in trials for murder.

“IV. Provided always, that women acquitted of such murder, but who by secret burying, or otherwise, endeavour to conceal the birth, the court shall adjudge such prisoner to be committed to the common jail or house of correction, for any time not exceeding two years.”

The benefit of lord Ellenborough's act was extended to Scotland, as his statute comprehended only England and Ireland. The act for Scotland is 6 George IV. cap. 126, and was passed on the 5th July, 1825. After reciting the preamble of the preceding act, and reciting the same list of crimes, it states, that, on conviction of any of the crimes recited in lord Ellenborough's act, “they shall be held guilty of a capital crime, and receive sentence of death accordingly.”

“II. If any person in Scotland shall maliciously, &c. throw or otherwise apply to any of his majesty's subjects, any sulphuric acid or other corrosive substance, calculated by external application to burn or injure the human frame, with intent either to murder or maim, or disfigure, or disable, or with the intent to do some grievous bodily harm to any of his majesty's subjects, and where in consequence any person shall be maimed, disfigured, or disabled, or receive grievous bodily harm; on lawful conviction, such person shall be held guilty of a capital crime, and receive sentence of death accordingly. Provided that, if it appear on the trial that, if under the circumstances of the case, death had ensued, the acts done would not have amounted to the crime of murder, the prisoner shall not be held guilty of

a capital crime. And provided also, that nothing in this or any other statute enacting a capital punishment shall be held to affect the power of the public prosecutor to restrict the pains of law."

Formerly the punishment of murder and manslaughter were one and the same, both having the benefit of clergy; so that none but unlearned persons were put to death for this enormous crime: but now the benefit of clergy is taken away from all murderers, &c.;\* and every person being convicted of murder, or of being accessory, *before* the fact, to murder, shall suffer death as a felon; and every accessory, to murder, *after* the fact, is liable to transportation for life, or imprisonment with hard labour, at the discretion of the court. In atrocious cases it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet, in chains, near the place where the fact was committed; but this was no part of the legal judgment. This was quite contrary to the express command of the Mosaical law, which says, "the body of a malefactor shall not remain all night upon the tree, but thou shalt in anywise bury him that day, that the land be not defiled;"† but it seems to have been borrowed from the civil law, which, besides the terror of the example, gives also another reason for this practice, viz. that it is a comfortable sight to the relations and friends of the deceased. It is now however enacted, that the judge shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be Sunday, and then on the Monday following), and that his body be delivered to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power was allowed to the judge, on good and sufficient cause, to respite the execution, and relax the other restraints of this act. A late act, however, has now altered this practice in some respects, and the sentence expresses "that the body of the offender shall be dissected or hung in chains, whichever of the two the court shall order."

*Petit treason* is also a species of murder; and happens either when a servant kills his master, a wife her husband, or a clergyman his bishop, to whom they respectively owe faith and obedience. To convict any one of petit treason, two witnesses are necessary; but one is sufficient to prove the murder. A person convicted of petit treason, is sentenced to be drawn upon a hurdle, hanged, and dissected.

Forcible abduction and marriage, which is vulgarly called stealing an heiress, is an offence against the female part of his majesty's subjects. It

\* 9 Geo. 1V. 31.

† Dent. xxi. 23.

is now enacted, that if any woman having an interest in real or personal estate, or being an heiress presumptive, or next of kin to any person having such interest, shall be taken away or detained against her will by any person from motives of lucre and with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender and his abettors shall be guilty of felony, and is liable to transportation for life or for years, or imprisonment with or without hard labour.\*

An inferior degree of the same, but not attended with force, is when any person takes away an unmarried girl, being under the age of sixteen years, out of her parents' possession, or any other persons having the lawful charge of her, and against their will; such offender is guilty of a misdemeanor and liable to a discretionary punishment by fine and imprisonment. By the new marriage act,† if the parties contract marriage, such marriage is not void; but the party concerned in procuring it forfeits all interest in the property thereby obtained, and effectual means are provided for securing the property to the issue, under the directions of either the courts of chancery or of the exchequer.

**COURTS OF CRIMINAL JURISDICTION.**—The criminal law of England is not vindictive, but, on the contrary, merciful. It acts with a promptitude on conviction that is calculated to exhibit an awful example and strike terror into offenders: but it at the same time manifests great tenderness and compassion, by providing for the prevention of crimes. Like a kind parent, it has more pleasure in warning its children against offences, than in punishing them for their transgressions.

*Preventive justice* consists in obliging those persons whom there is good ground for suspecting of future misconduct, to give, by some pledges or sureties for keeping the peace, or for their good behaviour, full assurance to the public that they will not offend against the laws. Any justice of the peace may demand such security according to his discretion: or it may be granted at the request of any subject, upon cause being shown. When, however, a person has actually offended against the law, he is liable to its penalties: but not until his conduct has been inquired into before the proper tribunal. The laws of England have not only enacted what punishment shall be inflicted for this or that offence, but several courts are likewise instituted, in which offenders are to be tried by learned judges, appointed by the king, to expound the law and pronounce its sentence.

The courts of criminal jurisdiction are those of a *public* and *general* authority throughout the kingdom: such as are *private* and *special* being confined to particular parts of the realm.

The highest criminal court in the kingdom, is the **HIGH COURT OF**

\* 9 Geo. iv. c. 31.

† 4 Geo. iv. c. 76.

PARLIAMENT. This court is supreme, not only in making, but also in executing laws. In it the greatest offenders, whether peers or commons, may, and frequently have been prosecuted and punished by trial on *impeachment*: which is a presentment to the house of Lords by the Commons of Great Britain in parliament assembled; as they are the most solemn grand jury in the nation. A peer of the realm may be impeached for any crime; and a commoner may be impeached before the lords for a capital offence, as well as for high misdemeanours. The king's ministers being responsible to parliament unquestionably exposes them to party caprice and revenge, and subjects them to the liability of being harassed with expensive and vexatious impeachments. On the other hand, there would be considerable danger of their screening themselves from just prosecution and merited punishment, by pleading a pardon under the great seal, did not the law wisely prevent such an abuse of the royal prerogative. The king cannot put a stop to the lords' proceedings to try the articles of impeachment exhibited by the commons, it being enacted that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.\*

The most public criminal court is the court of the lord high steward of Great Britain, instituted for the trial of peers indicted for treason or felony, or for misprision of either. The office of this great magistrate is very ancient, and was formerly hereditary, or at least held for life or during good behaviour; but it is now granted for the occasion: and it is necessary to bestow it upon a lord of parliament, else he is incapable to try such delinquent peer. When an indictment is found by a grand jury of freeholders at the assizes against a peer for treason, felony, or misprision of treason, the king creates a lord high steward *pro hac vice*, by commission under the great seal which recites the indictment so found, and gives his grace power to receive and try it. He then directs a precept to a sergeant at arms to summon the lords to attend and try the indicted peer. Every lord present shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. But a majority of twelve is required to convict a peer. In the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law, as the lords' triers are in matters of fact; and as they must not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial.

It has been a point of controversy whether the bishops, being the first estate of parliament, have any right to sit in the court of the lord high steward to try indictments of treason and misprision. Some incline to

\* 12—13. WIL III. c. 2.

imagine that they are included under the general words of the statute, "all peers who have a right to sit and vote in parliament;" but though bishops are clearly lords of parliament, yet their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility. However, there is no instance on record of their ever having sat on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court of the lord steward; they usually withdraw voluntarily, but enter a protest declaring their right to stay. In the Constitutions of Clarendon, made in the reign of Henry II., the bishops are expressly excused rather than excluded, from sitting and voting in trials which concern life and limb; and archbishop Becket's quarrel with Henry was not on account of being excepted, but because he compelled the bishops to attend at all. The determination, however, of the house of lords in the earl of Danby's case, 15th May, 1679, that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of "guilty or not guilty," which is quite consonant to the Clarendon Constitutions, and has ever since been adhered to.

Another public criminal court, is the court of King's Bench, which is divided into a *crown* side, and a *plea* side,—which on the crown side takes cognizance of all criminal causes, from high treason, down to the most trivial misdemeanor, or breach of the peace. Indictments from all the inferior courts may be removed into this court by writ of *certiorari*, and tried either at bar or at *nisi prius*, by a jury of the county. All informations filed in the court of king's bench, and all indictments removed there by *certiorari*, if not tried at the bar of the court, which rarely happens, must be tried at the assizes by writ of *nisi prius*. The judges of this court are the supreme coroners of the kingdom, and in virtue of that dignity reversed the return of the coroner's jury in the case of the policeman, Robert Cully, who was killed in the Calthorpe street riot. They are also sovereign justices of *oyer and terminer*, and of gaol delivery. Into this court also has reverted all that was good and salutary of the jurisdiction of the court of star chamber, which was a court of very ancient origin, consisting of lords spiritual and temporal, lay privy councillors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. It was finally abolished by Charles I., to the general joy of the whole nation.

The high court of Admiralty held before the lord high admiral of England, or his deputy, styled the judge of the admiralty, is not only a court of civil, but also of criminal jurisdiction. It has cognizance of all crimes and offences committed on the seas, or on the coasts, out of the body or extent of any English county. But, as this court proceeded without jury,

the caprice of the judge was apt to be guilty of arbitrary and oppressive conduct, and it was determined that offences should be tried by commissioners of *oyer and terminer* under the king's great seal, the admiral or his deputy, and three or four more—the indictment being first found by a grand jury, and afterwards tried by a petit jury.

These four courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise from one end of it to the other. There are also courts of a general nature, and universally diffused over the nation, but of a local jurisdiction and confined to particular districts.

The courts of *Oyer and Terminer*, and general gaol delivery, which are held before the king's commissioners; among whom are generally the two judges of the courts at Westminster. These courts are held twice a-year in every county in the kingdom, except the four northern ones, where they sit only once a-year. But in London and Middlesex they are open *eight* times a-year. The commission of general gaol delivery empowers the judges to deliver every prisoner who shall be in the gaol when they arrive, for whatever crimes committed; so that one way or other the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence. The justices of the peace, wherein the *assizes* are held, are all bound by law to attend there on pain of being fined, and to assist the judges in such matters as lie within their knowledge and jurisdiction. No man can sit as a judge of *assize* in his native county, although he may act therein as a commissioner of *oyer and terminer* and gaol delivery.

The court of general *quarter sessions* of the peace must be held in every county, once in every quarter of a-year; that is, the first week after Michaelmas-day—the first week after the Epiphany—the first week after the close of Easter—and in the week after the translation of St Thomas the martyr, or 7th July. It must be held before two or more justices of the peace, one of whom must be of the *quorum*. Its jurisdiction extends to the trying and determining all felonies and trespasses whatsoever. The justices, however, seldom or ever try any greater offences than larcenies; murders, and other capital felonies, they usually remit to the *assizes* for more solemn trial. The records or rolls of the sessions are committed to the custody of a special officer, called the *custos rotulorum*, who is always a justice of the quorum, and a man of integrity and honour. He is the principal *civil*, as the lord lieutenant is the principal *military* officer in the county, and is nominated by the king's sign manual. To him belongs the appointment of the clerk of the peace, which office he is prohibited from selling for money.

In most corporation towns there are *quarter sessions* held before justices of their own, within their respective limits; besides these there are occasional *petty sessions*, holden both in towns and counties, in the intervals of

the quarter sessions, for the despatch of business of inferior moment ; such as the licensing of ale-houses and the like.

The *Sheriff's Tourn*, or rotation, is a court of record, held twice every year, before the sheriff in different parts of the county, within a month after Easter and Michaelmas ; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred. This is therefore the great court-leet of the county, as the county-court is the court-baron ; for it was taken out of this, for the sheriff's ease.

The next court to be noticed is the *court-leet* or view of *frank-pledge* ; which is a court of record, held once a-year, and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet. It is the king's court, granted by charter to the lords of those hundreds or manors. The original object of the court-leet was the preservation of the peace, and the chastisement of those who disturbed it. All the freeholders of the district are obliged to attend this court, if required, each freeholder being considered by the wise system of the great Alfred as pledges for each other's good behaviour. But persons under twelve and above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, are excused from attendance there ; all others being bound to attend on the jury, if required, and make their due presentments. Anciently it was customary to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court-leet, and there take the oath of allegiance to the king. But this court has gradually degenerated into little more than a name.

The coroner's court is also a court of record, to inquire when any one dies in prison, or comes to a violent and sudden death ; by what means he lost his life ; and he is only entitled to do this on view of the body.

The court of the *clerk of the market* is incident to every fair and market in the kingdom, to punish misdemeanors therein, as the court of *pie poudre* is to determine all disputes concerning property. Its jurisdiction is principally the recognizance of weights and measures, whether they be the true standard or not ; which standard was formerly committed to the custody of the bishop of the diocese, who appointed a clerk (or clergyman) under him as inspector ; and hence, the officer, though now always a layman, is called *clerk of the market*.

Besides these there are several other courts of a private or special criminal jurisdiction.

The court of the *lord steward*, treasurer or comptroller of the king's household, instituted by Henry VIII. to inquire of felony by any of the king's sworn servants under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king or any of his privy council. The inquiry must be made by a jury of twelve sober and discreet men of the king's household.

The court of the *steward of the Marshalsea*, erected by Henry VIII., which inquires into and punishes all treasons, murders, manslaughter, bloodshed, &c., within two hundred feet from the gate of any of the king's palaces, or houses where the royal person shall abide. The proceedings are by jury of the officers and sworn servants of the household : part of the punishment is to cut off the hand.

Lastly, there are the criminal courts of the *lord high stewards of the two universities of Oxford and Cambridge*, which have jurisdiction over their respective members under a trial by jury. It has authority to determine all causes of property wherein a privileged person is one of the parties. A bill of indictment must first be found by a grand jury, and then the cognizance claimed. The high steward issues one precept to the sheriff of the county, who, thereupon, returns a panel of eighteen freeholders ; and another precept to the bedels of the university, who also return a panel of eighteen matriculated laymen ; and by a jury formed of one-half of each of these, the indictment is tried in the guildhall of the cities of Oxford or Cambridge. And if it be necessary to award execution, in consequence of finding the party guilty, the sheriff of the county must execute the university process, to which he is annually bound by oath.

PROCEEDINGS IN CRIMINAL CASES.—The proceedings in the courts of criminal jurisdiction are two-fold ; summary, and regular.

By a *summary* proceeding is meant the condemning or acquitting of an accused person, by judges appointed by statute, who are thereby empowered to inflict certain penalties on the offender without the intervention of a jury. Thus all trials of offences against the excise laws are to be determined by the commissioners of excise, or by justices of the peace. Again, the magistrates have the power to punish in a summary way, according to act of parliament, all persons guilty of swearing, drunkenness, &c. To avoid, however, the abuse of this authority as much as possible, the law has made it indispensably necessary that the party accused should be summoned to appear before the magistrates previous to any trial of the fact, in order that he may be heard in his own defence. Lastly, if a *contempt* be committed in any of the courts, the offender may instantly be apprehended and imprisoned at the discretion of the judge, without any further proof or examination.

But the regular and orderly method of proceeding is, by *arrest* in the first place : which is the apprehending of one's person, that it may be forthcoming to answer an alleged or suspected crime. But no one is to be apprehended unless he is charged with such a crime as will, at least, justify his being held to bail when taken.—An arrest may be made by a warrant. This is to be granted when the party requiring it makes oath concerning the crime committed. The warrant ought to be under the hand and seal of the justice who grants it, setting forth the time and place



of making, and the cause for which it is made: and should be directed to the constable or any private person *named*, requiring him to bring the party, either generally before *any* justice for the county, or specially before him by whom the warrant is granted. In the latter case it is called a *special* warrant. A warrant from the chief or other justice of the king's bench extends all over the kingdom, and is not dated from any county, but merely dated *England*. But the warrant of a justice of the peace for one county, must be backed by a justice in another, before it can be executed there. And now, any warrant for apprehending an English offender who may have escaped into Scotland, or *vice versa*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdom where the offence was committed.

In the year 1766, the house of commons declared, by a vote of the house, that the issuing of *general warrants* to apprehend all persons suspected of being guilty of the crime specified therein, without specially naming such persons, was illegal. Before that period, it had been the uniform practice of the secretaries of state, from the time of the Revolution, to adopt this method on particular occasions, without having, in any instance, been censured, until the 30th April, 1763, when John Wilkes was apprehended on this authority. Wilkes commenced an action in the common pleas, against Robert Wood, Esq., under-secretary of state, for seizing his papers under a general warrant: and after a hearing of nearly fifteen hours before lord chief justice Pratt and a special jury, Wilkes obtained a verdict. His lordship pronounced the warrant under which Mr Wilkes had been arrested, to be *unconstitutional, illegal, and absolutely void*. A decision so favourable to the liberties of the subject, rendered chief justice Pratt extremely popular, and he not only received marks of public favour from various parts of the kingdom, but his majesty George III., who was always a promoter of the civil and religious liberties of his country, signified his royal approbation of his conduct by creating him a peer of Great Britain, by the style and title of earl of Camden.

But arrests may be executed by officers without a warrant. A justice of the peace may apprehend any one committing a breach of the peace in his presence. The sheriff, too, and the coroner, may apprehend any felon within the county without a warrant. The constable has likewise great authority in criminal cases; and may without a warrant arrest any person for a breach of the peace, and in cases of felony *actually* committed, may break open doors to arrest the felon, and even kill him if he cannot be otherwise taken. But should the constable be killed in attempting to arrest a felon, it is murder in all concerned. If an officer arrest a felon under a warrant, it must be in all respects good, otherwise it is not murder if the constable is killed in its execution. Watchmen may, by virtue of their office, arrest all offenders, and especially night-walkers, and commit them to custody

until the morning. When a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending the suspected person without a warrant, in order to carry him before a magistrate.\* But where a private person had delivered another into the custody of a constable, on a suspicion which afterwards appeared to be unfounded, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had actually been committed.†

As an encouragement to any man to make exertion for the apprehension of criminals, it is enacted by law, that any person taking and prosecuting a felon to conviction, shall receive from the sheriff a reward of £40, and shall be entitled to the horses, furniture, arms, money, and other goods taken upon the person of the robber; with a reservation, however, of the right of any person from whom the same may have been stolen. And by various statutes, such persons as apprehend and convict felons guilty of burglary, house-breaking, horse-stealing, and those who are found at large during the term for which they were ordered to be transported, shall be exempt from serving all parish offices, and shall receive specific sums of money, from £10 to £40, according to circumstances. And now, if any offender has escaped from Ireland into England or Scotland, or *vice versa*, he may be apprehended by a warrant indorsed by a justice of the peace of the county or jurisdiction within which the offender shall be found; and he may be conveyed to that part of the united kingdom, in which the warrant is issued and the offence is charged to have been committed.

When an offender is arrested, he is taken before a magistrate, who takes down in writing the prisoner's examination, and the information of those who bring him. If the suspicion entertained against him be groundless, he must be immediately discharged; but if otherwise, he must either be committed to prison or admitted to bail, that is, he must put in sureties for his appearance to answer the charge brought against him. He ought to be admitted to bail in all offences against the common law, or any acts of parliament that are below felony, unless the bail be prohibited by some special statute. But persons accused of treason and murder cannot be bailed,—nor in cases where bills of indictment have been found for manslaughter,—nor such as, having been committed for felony, have broken prison,—nor persons outlawed,—nor such as have abjured the realm,—nor persons taken in the act of felony,—nor persons charged with arson,—nor excommunicated persons,—nor in many other cases of a doubtful

\* 7 & 8 Geo IV., c. 29.

† Professor Christian's Notes.

nature. If it is not a bailable offence, or the party cannot find sufficient security, he is to be committed to the county gaol, by the justices' *mittimus*, or warrant under his hand and seal, narrating the cause of his committal, to be kept in safe custody until delivered by due course of law. By the late statute of 7 George IV., the law on the subject of bails is entirely changed; that statute provides, that if a charge of felony before one or more justices be supported by positive and creditable evidence of the fact, or of evidence which, if not explained or contradicted, shall, in the opinion of the justice, or justices, raise a strong presumption of the guilt of the accused party, the person shall be committed for trial; but if there be only one justice present and the whole evidence does not raise a strong presumption of guilt, nor warrant the dismissal of the charge, the prisoner is to be remanded till he can be taken before two justices. If the prisoner be brought before two or more justices, either in the first instance or after having been remanded, and the evidence in support of the charge shall, in their opinion, not be such as to raise a strong presumption of guilt, but if, nevertheless, there appears sufficient ground for a judicial inquiry, such justices may admit the prisoner to bail. Since this statute was passed, therefore, a single justice cannot, under any circumstances, take bail upon a charge of felony; he must either dismiss the charge or commit the prisoner, if there be positive evidence, or a strong presumption of guilt; and if there is not a strong presumption of guilt, but he thinks that he ought not to dismiss the charge, he must remand the prisoner till he can be brought before two justices. If a magistrate should refuse, or, without cause, delay to bail a person who is bailable, he breaks the law, and greatly offends against the liberty of the subject; for both the common law and the preceding act require him to admit all persons to bail whose offences are within the provisions of the act. Nevertheless, to prevent any magistrate from taking either excessive or insufficient bail, he is liable in either case to be fined, whenever he forgets the duties of his office, and is influenced by his own feelings, instead of being guided by the principles of reason, justice, and humanity.

This commitment is not intended as a punishment, but only as an indispensable mode of securing the person of the offender against the day of trial. During his confinement he ought to be treated with all possible humanity, consistently with his safe custody, and the gaoler's responsibility. He should not be unnecessarily loaded with irons, nor suffer any other hardship than what is absolutely inseparable from the loss of his personal liberty. The law considers every man as innocent till a jury of his countrymen have declared him to be guilty. Within the last century several statutes have regulated the management of gaols, so that acts of oppression are of very rare occurrence, and, when they do occur, are more frequently the consequence of the prisoner's turbulence and ill be-

haviour, than in any disposition to tyranny or oppression on the part of the gaoler. And a humane and conscientious gaoler will guard against having his feelings hardened by daily witnessing so many objects of misery ; and, whilst he diligently attends to his charge to keep his prisoners safely, he will bear in mind that they may possibly be clear of the crimes laid to their charge. He will not needlessly thrust them into the inner prison, nor make their feet fast in the stocks, like the gaoler of Philippi ; but will show a compassionate regard to their persons. He will pour " wine and oil " into the wounds of their guilty conscience ; and when the magistrates send to let the prisoners go, he will suffer them to depart and go in peace, without exacting from them more fees than what are just and equitable.

Prosecution is the next step towards the punishment of offenders, and that is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former is either by *presentment* or *indictment*.

A *presentment*, generally taken, is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the king ; such as the presentment of a nuisance and the like, upon which the officer of the court must afterwards frame an indictment before the party prosecuted can be put to answer it.

An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer and terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, to inquire, present, do, and execute all those things, which on the part of the king, shall be then and there commanded them. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at least, and not more than twenty-three, that twelve may be a majority. The grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides on the bench. They then withdraw to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor ; and they are to hear evidence only on behalf of the prosecutor : because the finding of an indictment is only in the nature of an inquiry, or accusation, which is afterwards to be tried and determined : and the grand jury are only to inquire, upon their oaths, whether there be a sufficient cause to call upon the party to answer it. The grand jury ought not to be assisted by the depositions taken before the magistrate, except when these depositions could be read in evidence to the petit jury.

The duty of the grand jury is not only to indict all who shall appear to them to be criminal, but also to protect every innocent person from that vexation and danger which might be the effect of malice or tyranny, or both combined. In order to oblige these important juries to a more conscientious discharge of this two-fold duty, the following oath is appointed to be taken, both by the foreman and every other member of the grand inquest:—"You shall diligently inquire, and true presentment make of all such articles, matters, and things, as shall be given you in charge. And of all other matters and things, as shall come to your own knowledge, touching this present service. The king's counsel, your fellows', and your own, you shall keep secret. You shall present no person for hatred or malice; neither shall you leave any one unrepresented for favour or affection, for love or gain, or any hopes thereof; but in all things you shall present the truth, the whole truth, and nothing but the truth, to the best of your knowledge—so help you God."

After hearing the evidence, if the grand jury think the accusation groundless, they indorse the bill with the words "not a true bill," or "not found," and the party is discharged accordingly. But if the grand jury are satisfied of the truth of the accusation, they then indorse the bill "a true bill:" the indictment is then said to be found, and the party stands indicted. The law of England, however, is so tender of the lives of its favoured inhabitants, that no man can be convicted of any capital offence, at the suit of the king, but by the unanimous voice of twenty-four of his equals, who must also be his neighbours. For twelve, at least, of the grand jury must, in the first place, assent to his accusation; and afterwards, upon his trial, the whole petit jury must agree in finding him guilty. The indictment being found, is delivered publicly into court, and the clerk of the assize reads aloud "A true bill against A. B. for felony," &c.; or *vice versa*, if no bill has been found. Formerly, it was necessary that an indictment should have a precise and sufficient certainty, specifying the Christian name, surname, and addition of the estate and degree, mystery and craft, town, or place, and the county of the offender, in order to identify his person. But by the act 26th May, 1826, for improving the administration of criminal justice in England, it has been enacted "that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise, of the truth of such plea: but, in such case, the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed, as if no such dilatory plea had been pleaded."\* And to ascertain clearly the time and place, it was formerly

\* 7 Geo. IV. c. 64, s. 19.

necessary to state the day and township wherein the fact was committed ; but the statute just quoted provides, that a mistake in any of these particulars shall not stay or reverse the judgment. The offence itself must be clearly stated, and in some crimes particular words of art must be introduced, to express the exact idea which the law entertains of the offence. Thus, in treason, the facts must be laid to be done "treasonably, and against his allegiance," otherwise the indictment is void. Also, in indictments for murder, it is necessary to say that the party "murdered," not "killed," the deceased. It was also formerly essential to a good indictment that the *value* of the thing, or instrument of the offence, be expressed. This was necessary in larcenies, to ascertain whether it were grand or petit larceny, and whether the criminal was entitled to the benefit of clergy. But benefit of clergy, and the distinction between grand and petit larceny being now abolished, this reason no longer exists : nevertheless, on other grounds, it is still necessary that the thing stolen should be stated to be of some value. But there is a method of proceeding, at the suit of the king, without a previous indictment or presentment by the grand jury, and that is by way of information.

*Informations* are of two sorts ; first, those that are partly at the suit of the king, and partly of the subject ; and secondly, those that are in the name of the king alone. The former are usually brought upon penal statutes, which inflict a penalty on the offender : one part to the use of the king, and the other to the informer. Informations that are exhibited in the name of the king alone, are also of two kinds ; first, those that are truly and properly his own suits, and filed *ex officio* by the attorney-general ; secondly, those in which he is the nominal prosecutor : yet it is on the accusation of some private person or common informer. These informations are filed by the king's coroner and attorney in the court of king's bench. The objects of the king's own prosecutions are properly such enormous misdemeanors, as tend directly to disturb and endanger his government, or to molest and affront him in the discharge of the regular duties of the crown. In such cases the crown immediately prosecutes to avoid the danger that would accrue from the delay of applying, first of all, to a grand jury, to find a bill of indictment. The object of these informations, filed by the master of the crown office, upon the complaint or relation of a private person, are any gross misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not tending peculiarly to disturb the government, but which, on account of their enormity or dangerous example, deserve the most public censure. When an information is filed in either of these ways, it must be tried by a petit jury of the county where the transaction took place ; and if the defendant be found guilty, the court of king's bench must be resorted to for his punishment.

If an information or an indictment for a misdemeanor, removed into the

court of king's bench by *certiorari*, be not of such importance as to be tried at the bar of the court, it is sent down by writ of *nisi prius* into the county where the crime is charged to have been committed ; and it is there tried either by a common or a special jury, like a record in a civil action : and if the defendant is found guilty, he must afterwards receive judgment from the court of king's bench. But when an indictment for treason or felony is removed by *certiorari*, the party pleading the record is sent down by *nisi prius* to be tried ; the judges of *nisi prius* may, upon that record, proceed to trial, judgment, and execution, as if they were justices of gaol-delivery.\*

A writ of *quo warranto* is another species of information, usually practised to try the civil rights of such as have intruded into any office or franchise ; but an information in the nature of a *quo warranto* being merely a civil proceeding, the court of king's bench will grant a new trial, although the verdict be given for the defendant.

We will now inquire into the manner of issuing *process*, after finding indictment to bring in the accused to answer it, if he has been previously in custody ; but if he should be at large, having *fled for it*, or by any means secreted himself, then *process* is to be issued out against him. The regular process for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is a summons to cause the party to appear, as the indictment cannot be tried if the offender be not personally present in court. If it appear, by the return to the writ of *venire*, that the party has lands in the county, then a *distress infinite* shall be issued from time to time, till he make his appearance. But if he has no lands, the sheriff shall be commanded, by writ of *capias*, to take his body and have him present at the next assizes. If he cannot be taken on the first *capias*, a second and a third shall issue, called an *alias* and a *pluries capias*. But on indictments for treason or felony, a writ of *capias* is the first process. After all these several writs have been issued, and the offender absconds, he may be exacted, proclaimed, or required to surrender at five county courts : and if he returned *quinto exactus*, and do not appear at the fifth exaction, then he is to be adjudged *outlawed*, or put out of the protection of the law. He then becomes incapable of taking any of its benefits, either by bringing actions or otherwise. His life, however, is still under the protection of the law, although anciently an outlawed felon might be knocked on the head by any one that should meet him ; yet now it is holden that no man is entitled to kill him wantonly, unless in the endeavour to apprehend him : otherwise it is murder. The execution of a malefactor, even although condemned to death by the law, by an unauthorized person, is murder, although justifiable when the law requires it. And further, if judgment of

\* Professor Christian.

death be given by a judge not authorized by *lawful* commission, and execution be done accordingly, the judge is guilty of murder. And upon this account Sir Matthew Hale, though he accepted the place of a judge under Cromwell's government, yet declined to sit on the crown side at the *assizes*, and try prisoners : having the strongest objections to the usurper's authority to grant a commission.

Outlawries on indictments for misdemeanors, are punished like outlawries on civil actions, with forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the criminal had been found guilty by a petit jury. An outlawry may be reversed by a writ of error ; for if a single point be omitted or misconducted, the whole outlawry is illegal. On a reversal, the accused party is allowed to plead to the indictment, and defend himself against it.

Writs of *certiorari facias* are writs usually had before trial, after the indictment is found, to certify and remove it, with all the proceedings thereon, from any inferior court of jurisdiction, into the court of king's bench, which is the sovereign ordinary court of justice in criminal causes. This may be done when it is surmised that a partial or insufficient trial will probably be had in the court below. Indictments found by the grand jury against a peer, or privileged person of the universities, must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or to the courts established by law in the universities, as the case may be, to be there respectively tried and condemned. Upon the appearance of the offender in court, he is immediately to be arraigned on the indictment ; that is, he is to be called to the bar of the court, to answer to the charge brought against him ; and the court has no authority to order his irons to be taken off till he has pleaded, and the jury are charged to try him. The prisoner is called upon at the bar to hold up his right hand, in order that by this act he may own himself to be of that name by which he is called, and thus identify his person from the crowd around him : but if he confess that he is the person named, it is sufficient. The act of holding up the right hand was both a significant and important ceremony for those who upon conviction might have been punished with death, except for the benefit of clergy, now wholly abolished. Laymen could only once avail themselves of the benefit of clergy ; and when convicted, instead of being executed, they were burned on the brawn of the thumb ; the holding up his hand, therefore, was to show the court whether he had ever been convicted before of any clergyable offence. The indictment is then to be distinctly read to the prisoner in the English tongue, that he may fully understand the charge that is brought against him. He is then asked whether he is guilty or not guilty.

When arraigned, a prisoner either stands *mute* or *confesses* the fact, or



pleads to the indictment. He is understood, in law, to stand mute when he either makes no answer at all, answers foreign to the purpose, or having pleaded guilty, he refuses to put himself upon his country. If he say nothing, a jury is to inquire whether he is obstinately silent, or dumb by the visitation of God. If the latter should appear to be the case, the court shall proceed to trial; but it has not yet been decided whether sentence of death can be passed against such a person. But if he be found *obstinately* mute, it has long been held that this is equivalent to conviction, and the prisoner shall receive the same judgment and execution in all such cases, as if he had been convicted by a verdict or confession of the crime. The English judgment of *penance* or *peine forte et dure*, was, that the prisoner be remanded to the prison from whence he came, and put into a low dark chamber, and there be laid on his back on the bare floor, naked, unless where decency forbids; and that there be placed upon his body as great a weight of iron as his body can bear: and more, that he have no sustenance, save only, on the first day, three morsels of the worst bread, and on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be his daily diet alternately, *till he died*. Several persons have had resolution and patience to undergo so terrible a death, in order to benefit their heirs, by preventing a forfeiture of their estates, which would have been the consequence of conviction by a verdict. Of this there is a memorable story of an ancestor of an ancient family in the north of England, who, in a fit of jealousy, killed his wife and his children, which were at home: and proceeding with an intent to destroy his only remaining child, an infant nursed at a farm house at some distance, he was intercepted by a storm of thunder and lightning. This interruption gave time for conscience to resume its empire in his breast. He desisted from his purpose, and having surrendered himself to justice, in order to secure his estates to this child, he had the resolution to die under the dreadful judgment of *peine forte et dure*.

This dreadful punishment is now, however, wholly abolished. It was lately enacted that if any person being arraigned for high treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of "not guilty" on behalf of such person; and such plea shall have the same force as if actually pleaded by the party himself;\* which is a much more satisfactory method of dealing with such cases to the public mind, and obviously operates much more powerfully; as an example, that a prisoner should suffer punishment, after a public manifestation of his guilt by evidence, than that he should be punished so cruelly only upon presumption of guilt, arising from his obstinate silence.

\* 7 and 8 Geo. IV., c. 28.

If the prisoner *confess* the crime charged in the indictment, the court has nothing farther to do than to pronounce judgment. From a consciousness of guilt, and perhaps contrition of heart, a prisoner will plead guilty, to avoid adding to his crime by telling a falsehood. In a *moral* point of view, such a frame of mind is praiseworthy : but neither the law of nature nor of the land requires a man voluntarily to subject himself to human punishment, by confessing his sins to his fellow creatures, every man being deemed innocent in the eye of the law till he has been proved to be guilty, to the satisfaction of twelve of his equals ; and it is the duty of the prosecutor to substantiate his guilt by credible evidence. In a *legal* sense, a prisoner may plead *not guilty* with the greatest propriety before a human tribunal : and which may be done consistently with sincere repentance and humble confession to Almighty God. After conviction, however, if he be really guilty, and truly penitent, he will also make an unreserved acknowledgment to man.

It may not be uninteresting to notice a popular error respecting turning *king's evidence*, by one of the accomplices in any crime. It is too generally believed, that an accomplice, who voluntarily offers to give evidence against his companions, is *entitled* to a pardon. This, however, is a great mistake. It is true that justices of the peace have usually encouraged an accomplice to make a full discovery, and to give his evidence without prevarication and fraud, by intimating, at least, that he himself shall not be prosecuted. In the case of Mrs Rudd, it was laid down by lord Mansfield, that no authority is given to a justice of peace to pardon an offender, and to tell him that he shall be a witness, at all events, against others. But when the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a *hope*, that he who will behave fairly, and disclose the whole truth, and bring the others to justice, shall himself escape punishment. But this discretionary power is founded in practice only, and cannot control the authority of the court of gaol-delivery, and exempt, at all events, the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness, and unless he should see some particular reason for a contrary conduct, he will prefer the one to whom this particular encouragement has been given by the justice of peace. This admission to be a witness amounts only to a promise of a recommendation to mercy, upon condition that the accomplice makes a full and fair disclosure of all the circumstances of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. On his failure he forfeits all claim to protection. On a trial, some years ago, at York, before Mr Justice Buller, the accomplice, who was admitted a witness, denied his evidence, and all that he had before confessed, on which the prisoner was acquitted : but the judge ordered an indictment to be pre-

ferred against this accomplice for the same crime, and on his confession and other circumstances, he was convicted and executed.\* But those accomplices have a *right* to pardon, who turn king's evidence on the faith of the king's special proclamation.

When the prisoner neither stands mute nor confesses the fact, he is then said to *plead*, or make his defence on the arraignment. This is done either by plea to the jurisdiction, or a demurrer, or a plea in abatement, or a special plea in bar, or by the general issue.

A plea to the *jurisdiction* is when an indictment is taken before a court that cannot take cognizance of the offence. As if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in this and similar cases he may except to the jurisdiction of the court without answering at all to the crime alleged. A *demurrer* to the indictment is when the crime charged is allowed to be true, but the prisoner joins issue on some point of law in the indictment, by which he asserts that the fact, as stated, is not felony, treason, or whatever the crime is said to be. But this plea is seldom used, because the same advantage may be taken in arrest of judgment, on conviction. A plea in *abatement* is principally for a misnomer, a wrong name, or a false addition to the prisoner: as if John Jones, gentleman, is indicted by the name of Thomas Jones, esquire, he may plead that he has the name of John, and not of Thomas; and that he is not an esquire, but a gentleman. But this is a mere delay, which avails the prisoner but little, as a new bill of indictment may be framed, corresponding to the name and degree which he has avowed belong to him. But this plea has been entirely done away with by statute.†

But a far more substantial kind of plea is a special plea *in bar*, which affects the merits of the indictment, and gives a reason why the prisoner ought not to put himself upon his trial for the crime with which he is charged. Special pleas in bar are of four kinds:

1st, The plea of a *former acquittal*. It being an universal maxim in English law, that no man shall be brought into jeopardy of his life more than once for the same crime. 2nd, A *former conviction* for the same identical crime is a second plea in bar, although no judgment was ever given, or perhaps ever will be, which is a good plea in bar to an indictment: but it must be observed, that both these pleas in bar must be on a prosecution for the same identical act and crime. 3rd, A *former attainder* is a good plea in bar, whether it be for the same or another felony. For whenever a man is attainted of felony, by judgment of death, either upon a verdict or confession by outlawry, he may plead such attainder in bar to any subsequent indictment or appeal for the same or any other felony. And this because the prisoner is dead in law by the first attainder, his blood is

\* 7 Geo. IV., c. 64.

† Professor Christian's Notes.

already attainted, and he has forfeited all that he had. But to this general rule there are exceptions. 4th, The last plea in bar to be mentioned is a *pardon*, which at once destroys the end and design of an indictment, by remitting that punishment which the prosecution is calculated to inflict. It is of great importance to plead a pardon in bar, or in arrest of judgment, *before* rather than after sentence is past; because by stopping the judgment it prevents the corruption of blood by attainder: for the blood once corrupted by an attainder, cannot be again restored but by an act of parliament.

But the only plea on which the prisoner can receive his final judgment of death is the general issue, or plea of *not guilty*. In indictments of felony and treason, the prisoner must plead the general issue of not guilty, as he cannot put in any special matter by way of plea, but only give it in evidence, of which the jury will take notice, and give a verdict accordingly. The prisoner having pleaded *not guilty*, the clerk of the arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove him so. And thus the king and the prisoner are at issue. The prisoner is then asked how he will be tried, who answers "by God and the country;" to which the clerk replies, "God send thee a good deliverance:" a petition expressive of the law's compassion, which would rather that the prisoner's innocence might appear, than that his conviction and punishment should be the result of the trial. But if the prisoner refuse to put himself on his trial in the usual form, his obstinacy is construed into a *confession* of his guilt, and he is convicted of the felony, &c. accordingly.

The prisoner having been arraigned, and no other plea in bar of farther proceedings established, he must take his trial on the general issue or plea of "not guilty," or, in other words, the indictment must be submitted to the impartial examination and decision of a jury. We are now, then, advanced to a very important and a most interesting stage of the business. To behold a fellow subject, and what may perhaps come closer home, a fellow sinner, accused by twelve of the first men in the county of a crime, which, if proved in his presence, will deprive him either of his property, his liberty, or his life, or perhaps of them all; to see the king, emphatically called the father of his people, represented by the judge, arrayed with the robes, and surrounded with the insignia of his office, sitting to distribute justice with an impartial hand; to mark the alternate forebodings of a crowded and anxious audience; to notice the patient attention of the jury to all the evidence in favour of as well as against the prisoner; how eagerly they drink in every syllable of his defence, and with what caution and tenderness they return their verdict; to observe the trembling anxiety with which the unhappy prisoner waits for the dreadful words that are to pronounce his guilt and his doom, or the elating sentence which is to send

him guiltless from the bar—is a scene at once so solemn and affecting, that no humane person can survey it without the most lively emotions.

In the superstitious age of our Saxon ancestors, several very exceptionable modes of trial were ignorantly had recourse to, in order to ascertain the guilt or innocence of the accused, it being a general opinion at that time that the Almighty would always miraculously interpose to save the innocent. This absurd and presumptuous notion, however, of the immediate interference of divine Providence, in deciding the guilt or innocence of any by *ordeals*, or their trials by *fire* and *water*, and afterwards by the trial of *battel*, was at length expelled from the minds of the English, who, as they became more enlightened, adopted the superior mode of trial by jury. The two former were of Saxon, the latter of Norman institution. The trial by *battel*, although in desuetude, was not abolished till the 22nd June, 1819, when an act was passed making it “unlawful for any person, at any time after the passing of this act, to commence, take, or sue appeal of treason, murder, felony, or other offence, against any other person whatsoever, but that all such appeals shall from henceforth be utterly abolished.”\* The last instance where this appeal to trial by *battel* was tendered, was a short time before, and which indeed occasioned the repeal act just quoted, in an appeal of murder, *Ashford v. Thornton*. And the last time that trial by *battel* was actually awarded, was in the case of Lord Rae and Mr Ramsay. The king, by his commission, appointed a constable of England to preside at the trial, who proclaimed a day for the duel, commanding the combatants to appear with a spear, a long sword, a short sword, and a dagger; but the combat was prorogued to a farther day, before which the king revoked the commission.†

The form and manner of waging *battel* upon appeals, were much the same as upon a writ of right; only the oaths of the combatants are more striking. The appellee, when appealed of felony, pleads not guilty, and throws down his glove, declaring he would defend the same by his body: the appellant takes up the glove, and replies, that he is ready to make good the appeal, body for body; upon which the appellee took the book in his right hand, and in his left the right hand of his antagonist, swearing as follows: “Hear this, O man, whom I hold by the hand, who callest thyself John, by the name of baptism, that I, who call myself Thomas, by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony; so help me God, and the saints: and this I will defend against thee by my body, as this court shall award.” To which the appellant replied, holding the bible and his antagonist’s hand in the same manner as the other: “Hear this,

\* 59th Geo. III., c. 46.

† Professor Christian’s Notes.

O man, whom I hold by the hand, who callest thyself Thomas, by the name of baptism, that thou art perjured ; and therefore perjured, because that thou feloniously didst murder my father, William by name ; so help me God, and the saints : and this I will prove against thee by my body, as this court shall award." The battel was then fought with the same weapons, viz., batons ; the same solemnity, and the same oaths against amulets and sorcery, that were used in the civil combat ; and if the appellee be so far vanquished, that he cannot or will not fight any longer, he was then adjudged to be hanged immediately ; and then, as well as if he had been killed in battel, the divine determination was deemed to have been in favour of the truth, and his blood was attainted accordingly. But if he killed the appellant, or could maintain the fight from sun rising till the stars appeared in the evening, he was then acquitted. Likewise, if the appellant became recreant, and pronounced the horrible word of *craven*, he lost his *liberam legem*, and became infamous, in consequence the appellee recovered his damages, and was for ever acquitted, not only of the appeal, but of all indictments likewise for the same offence.

The origin of the *trial by jury*, which is now such an essential part of our constitution, is unquestionably very ancient, and derived, according to some authors, from those barbarous tribes which every where invaded the Roman provinces, and carried along with them their natural love of freedom. Mr Hume, however, is of opinion that the first lineaments of the English jury originated in the inventive and sagacious mind of the great Alfred. The division of all England by this extraordinary prince into counties, hundreds, and tithings, was an institution admirably calculated for restraining a licentious people, and administering impartial justice amongst all ranks throughout the kingdom. This wise system made every man a surety for his neighbour's good behaviour : and the method which it adopted for the decision of all causes, "deserves," says Hume, "to be noted as being the origin of juries." Certain it is, that in flowing down to us, it met with many checks and interruptions. But it is generally allowed, that it broke through all impediments, that its channel was widened and deepened after the conquest, that it ran in a stronger current from the reign of the second to that of the third Henry, gradually swelling from that period to its present height, and by overflowing our happy country, has, under the good providence of God, rendered it the fertile, the happy, and the envied land of freedom.

In the reign of George IV., various new regulations were made respecting the qualification of jurors : but as that act will be found in the legal history of that prince hereafter, it need not be here more particularly noticed. Since the abolition of the superstitious modes of decision, the only forms of trials in criminal cases in England has been by the peers in the high court of parliament, and the trials of commoners by

jury. This latter form is indeed extended even to the nobility in all criminal cases ; treason, felony, and misprision of treason only excepted. There is a very important advantage in the English trial by jury in criminal cases ; for as in times of violence the subject may justly apprehend more danger in suits between the king and him, than in disputes between one subject and another, the law has wisely placed the strong and two-fold barrier of a previous presentment, and a subsequent trial by jury between the liberty of the subject and the prerogative of the crown. In short, no man can be tried, even by a jury of his equals, for any crime, until twelve of his fellow subjects have, first of all, agreed upon oath that he ought to be called upon to answer the matter charged against him in the indictment ; and even then he is shielded from the arm of vengeance till the petty jury pronounce him *guilty*. Thus the subject is, as it were, hermetically sealed and guarded against arbitrary power, on the one hand, and the insidious machinations of private revenge on the other.

But it is now time to take a view of the proceedings in a criminal trial by jury. When the prisoner has pleaded *not guilty*, and put himself upon his country for trial, the sheriff of the county is to return a panel of jurors, who must be indiscriminately taken, and freeholders of the county in which the crime was committed. When the trial is called on, the jurors are to be sworn as they appear, to the number of twelve, unless they are challenged by the party. Persons indicted for smaller misdemeanors, after having pleaded *not guilty*, may *traverse* the indictment. In which case they usually give security to appear at the next session or assize, and then and there to try the traverse, giving notice to the prosecutor of the same. By the traverse act,\* where a defendant has been in custody, or held to bail for a misdemeanor twenty days before the sessions of the peace, of oyer and terminer, or of gaol-delivery, at which the indictment was found, the defendant shall plead, and the trial shall take place at such sessions, unless a *certiorari* be delivered before the jury are sworn. And if a defendant, indicted for a misdemeanor at any of these sessions, not having been in custody, or held to bail twenty days before the session at which the indictment was found, but who shall have been in custody, or held to bail to appear at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session, he shall plead and be tried, unless a *certiorari* is delivered before the jury are sworn.

All persons, however, indicted for high treason and misprision of treason, shall not only have a copy of the indictment, but a list of all the witnesses to be produced against them, with their professions and places of abode, delivered to them, ten clear days, exclusive of the days of delivery

\* 60 Geo. III. and 1 Geo. IV.

and the day of trial, and of the intervening Sundays previous to the trial, and in the presence of two witnesses, that they may be properly prepared to make their challenges and defence, and to bring forward anything which may destroy the credibility of any of the witnesses,—a striking instance of the fatherly care of the sovereign, by consenting to laws which preserve the life, liberty, and property of the subject from any unjust exercise of his power.

*Challenges* may be made either by the king or the prisoner, and against either an individual juror or the whole array, for the very same reasons as in civil causes: and it will be seen that it is not without reason that the laws of England are so celebrated for their tenderness and compassion to the prisoner; for he is allowed, in all capital cases, peremptorily to challenge a certain number of jurors, without assigning any cause whatever, that he may not be tried by any one man against whom he may have conceived a prejudice; besides, were he obliged to state the cause of his challenge, and the court not allow the juror to be set aside, he might feel resentment against the prisoner. This privilege of peremptory challenges, granted to the prisoner, was formerly denied to the king, who must assign a reason for his challenge.\* This statute was repealed in 1825, by an act hereafter quoted,† but similar provisions were re-enacted.

It is evident, however, that this great indulgence affords the prisoner an opportunity of challenging every juror till it were impossible to try him. To remedy this inconvenience, the law formerly fixed the number of thirty-five: that is one short of three juries; but now the number is reduced to twenty,‡ beyond which no prisoner is allowed to challenge; because if he did it, the conclusion is that he has no intention to be tried at all: in which case it was considered that the prisoner stood mute, and sentence passed as if convicted on his own confession. If, from any cause, a sufficient number of jurors cannot be had from the original panel, a *tales* may be awarded as in civil cases, till the number of twelve is sworn, “well and truly to try, and true deliverance make, between our sovereign lord the king and the prisoner whom they have in charge, and a true verdict to give, according to their evidence.” Before a juryman is sworn, he is desired “to look at the prisoner;” not for the gratification of a wanton curiosity, but that the unhappy situation of the culprit may so far excite his compassion, as shall induce him not only to do justice between him and the king, but to lean to the side of mercy, as far as possible, consistently with his solemn oath, if any doubt of his guilt should arise in his mind.

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and en-

\* 33 Edw. I.

† 6 Geo. IV., c. 50.

‡ Ibid



forced, by the counsel for the crown or prosecution. But it is a settled rule at common law, that no counsel shall be allowed to a prisoner upon his trial on the general issue, in any capital crime, unless some point of law shall arise, proper to be debated. A rule, however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see that the proceedings against him are legal, and strictly legal, — which seems to be inconsistent with that humanity and compassion with which the law of England treats unfortunate prisoners. For on what face of reason can that assistance be denied to save a man's *life*, which is freely allowed for every petty trespass? But the judges themselves are sensible of this defect, and never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions himself respecting matters of fact. The maxim that the judge is counsel for the prisoner signifies nothing more than that the judge shall take care that the prisoner shall not suffer from the want of counsel. The judge is counsel only for public justice, and to promote that object alone, all his inquiries and attention ought to be directed. On a trial for the murder of a *male* child, the counsel for the prosecution concluded his case without asking the sex of the child, and the judge would not permit him afterwards to call a witness to prove it, but in consequence of the omission he directed the jury to acquit the prisoner. But to the honour of that judge it ought to be stated, he afterwards declared in private his regret for having done so.\*

It is very extraordinary, says professor Christian, that the law of England should have denied the assistance of counsel when it is most wanted, that is, to defend the life, the honour, and all the property of an individual. It is the extension of that maxim of natural equity, that every one shall be heard in his own cause, that warrants the admission of hired advocates in courts of justice; for there is much greater inequalities in the powers of explanation and persuasion in the natural state of the human mind than when it is improved by education and experience. Among professional men of established character, the difference in their skill and management is generally so inconsiderable, that the decision of the cause depends only on the superiority of the justice in the respective cases of the litigating parties. Hence the practice of an advocate is absolutely necessary to the administration of substantial justice. An honourable barrister will never wilfully mistake law or facts within his own knowledge, but he is justified in urging any argument, whatever may be his own opinion of its solidity or justice, which he thinks will promote his client's interest: for reasoning in courts of justice, and in the ordinary affairs of life, seldom admits of geometrical demonstration; but it not unfrequently

\* Professor Christian.

happens, that the same argument which appears sophistry to one, is sound logic in the mind of another; and daily experience proves, that the opinions of a judge and an advocate are often diametrically opposite. Many circumstances may occur, which will justify or compel an individual member of the profession to refuse to undertake the defence of a particular client; but a cause can hardly be conceived to be so bad which ought to be rejected by the whole bar: for such refusal would excite so strong a prejudice against the prisoner as to render him in a great degree condemned before his trial. Let the circumstances against a prisoner be ever so atrocious, it is still his advocate's duty to see that his client is convicted according to those rules and forms which the wisdom of the legislature has established as the best protection of the liberty and the security of the subject. But the conduct of counsel in the prosecution of criminals, ought to be very different from that which is required of them in civil actions, or when they are engaged on the side of a prisoner: in the latter case, they are their client's advocates only, and speak but by his instruction and permission; in the former, they are the advocates of public justice, or, to speak more professionally, they are the king's advocates, who in all criminal prosecutions appears both as the protector and the avenger of his people; and both the king and the country must be better satisfied with the acquittal of the innocent, than with the conviction of the guilty. Hence, in all criminal prosecutions, especially where the prisoner can have no counsel to plead for him, a barrister is as much bound to disclose all those circumstances to the jury which are favourable to the prisoner, and to reason upon them as fully, as those which are likely to support the prosecution.\*

In cases of high treason, petit treason, and misprision of treason, *two* lawful witnesses are required to convict a prisoner, unless he shall willingly, and without violence, confess the same. In prosecutions for high treason, the law requires that the overt act or acts be proved to have been committed at the place specified in the indictment. With respect to *two* witnesses being necessary, in most instances, to prove the same overt act, it may be observed, that if one witness prove one overt act, and another witness prove another overt act of the same species of treason, that is sufficient to prove the crime charged, according to the requisition of the statute; but in almost every other accusation, one positive witness is sufficient. It was an ancient and commonly received practice, that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. The courts, however, grew so heartily ashamed of so unreasonable and oppressive a doctrine, that a practice was gradually introduced of examining witnesses for the prisoners, but not upon oath; still the jury

\* Professor Christian's Notes.

gave less credit to the prisoner's evidence than to that produced by the crown. Against this unreasonable and tyrannical practice, Sir Edward Coke very justly protests, declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him. The house of commons were so sensible of this absurdity, that in the bill for abolishing hostilities between England and Scotland,\* where felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it too, against the efforts, both of the crown and the house of lords, in opposition to the practice of the courts in England, and the express law of Scotland, "that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced, for his clearing and justification." At length the same measure of justice was established throughout all the realm, in cases of treason, within the act † and it was afterwards declared, that in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.‡

In consequence of the life of the late king George III. having been attempted in the theatre, by a maniac shooting at him, it was enacted, "that in all cases of high treason, when the overt act shall be assassination, or killing of the king, or any direct attempt against his life; the persons charged with such an offence, shall and may be indicted, arraigned, tried, and attainted, in the same manner and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons stood charged with murder."§

Likewise, in indictments for perjury, *two* witnesses are required to convict the accused. Although the mere similitude of the hand-writing in two papers, shown to a jury, without other concurrent testimony, is not evidence that both were written by the same person; yet the testimony of witnesses, well acquainted with the party's hand-writing, is evidence in all cases, to be left to a jury, if the papers were left in the prisoner's custody. All presumptive evidence of felony is to be admitted with caution; for the law holds that it is better that ten guilty should escape, than that one innocent person should suffer punishment.

The evidence for this being gone through, the prisoner is then called upon for his defence, and permitted to bring forward such witnesses as he pleases, in his own favour. The judge now sums up the whole evidence, and makes suitable remarks on it to the jury, by pointing out the law of

\* 4 James I., c. 1.

† 7 W. & M., c. 3.

‡ 1 Anne, c. 9.

§ 39 and 40 George III., c. 83.

the case, showing where the evidence is to the purpose, and where it is defective, and uniformly instructing them, that if any *doubt* of the prisoner's guilt rests upon their minds, they are bound in mercy to acquit him: it being the very essence of English liberty to protect the subject against foul charges in the criminal courts of justice. The jury then retire to consider their verdict, which they must give in *open court*, not *privately* to the judge, as sometimes happens in civil causes.

When the evidence on both sides is closed, the jury cannot be discharged unless in cases of evident necessity, till they have given in their verdict: and no verdict can be given unless the whole of the jury are agreed. The unanimity of twelve men is the peculiar characteristic of an English jury: but a regulation so repugnant to all experience of human conduct, passions, and understandings, could hardly, in any age, have been introduced into practice by a deliberate act of the legislature. It has been such, that as no effective verdict could originally be given by fewer than twelve jurors, although more were present, so afterwards when only twelve were sworn, their unanimity became indispensable.

If the jury, therefore, find the prisoner not guilty, he is then for ever quit and discharged of the accusation, except he be appealed of felony within the time limited by law. And upon his acquittal or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the gaoler. But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways: either by confessing the offence and pleading guilty, or by his being found so by the jury.

The act of George IV., hereafter given, repealed all the old statutes which allowed compensation to the prosecutor for his reasonable expenses, and if poor, for his loss of time, out of the county stock, if he petitioned the judge for that purpose; and introduces various new provisions respecting the costs of criminal prosecutions. By its 22nd section the court is empowered in all prosecutions for felony, to order payment to the prosecutor of the costs of preferring the indictment, and payment to the prosecutor and witnesses of such sum as may seem sufficient to reimburse them for the expenses incurred in attending before the examining magistrate and the grand jury, and in otherwise carrying on the prosecution, and also to compensate them for their trouble and loss of time therein. The court are also empowered to grant costs and remuneration for loss of time, though no bill of indictment is preferred, if the parties have *bona fide*, appeared in court in obedience to a subpoena or recognizance. The court are also empowered to grant the expenses of prosecutors and witnesses in prosecutions for certain misdemeanors. On conviction of larceny in particular, the prosecutor is entitled to restitution of goods. And it is now usual for the court, on the conviction of a felon, to order immediate re-

stitution of such goods as are brought into court to be made to the several prosecutors; or else the party may peaceably retake his goods wherever he happens to find them, unless a new property be fairly acquired in them. The owner of stolen goods, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again: even with notice of the theft, before conviction. And if the owner loses them by a fraud, and not by a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person: as a pawn-broker, who has fairly acquired a new right of property in them.

It sometimes happens, when the jury find the prisoner *guilty*, that they recommend him to *mercy*. But that the king may exercise this bright jewel of the crown with judgment and discretion, juries so recommending, have been required to state their reasons: which, however, by no means insures to the prisoner even the mitigation of punishment, much less a pardon. For although the jury who tried colonel Despard accompanied their verdict with the following words, "My lord, we do most earnestly recommend the prisoner to mercy, on account of the high testimonials to his former good character and eminent services;" nevertheless, he was executed, with all the accomplices of his guilt. Let no man, therefore, presume to transgress the law, and "lay the flattering unction to his soul" that his former good conduct will either extenuate his guilt or alleviate his punishment.

After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance, of which the principal formerly was the BENEFIT OF CLERGY. But that absurd exception being now entirely abolished,\* it is only here inserted as a matter of curiosity and history.

BENEFIT OF CLERGY originated from a constitution of the pope, "that no man should accuse the priests of holy church before a secular judge." This privilege was at length claimed by the popish clergy, as a *divine right* to which they were entitled, founding such an unreasonable exemption on a ridiculous perversion of that text of scripture, "*touch not mine anointed, and do my prophets no harm.*"† The blind submission which Christian princes paid in the dark ages to the authority of the church, only increased the monstrous pretensions and the grasping ambition of the popish clergy, who did not fail to abuse the superstitious lenity of their civil rulers. There was nothing that they did not render subservient to the interests of their order. Whatever they touched, was, by a sort of magic, turned into gold: and as their power increased, they multiplied their privileges in proportion. By their canons, therefore, and constitutions, they endeavoured

\* 7 and 8 Geo. IV., c. 28.

† 1 Chron. xvi. 22.

at, and, when they met with easy princes, they obtained vast extension of these ; as well in regard of the crimes themselves, of which the list became quite universal, as of the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many who were altogether laymen.

In England, although the pope's usurpations were many and intolerable, till Henry VIII. entirely exterminated his supremacy, yet a total exemption of the clergy could never be thoroughly effected, and the privilege was exercised with great uncertainty until the reign of Henry VI., a weak though pious prince ; when it was finally settled, that the prisoner should be first arraigned before the secular judge, and might either *then* claim his benefit of clergy by way of declinatory plea, or *after conviction* in arrest of judgment. This privilege was originally restricted to those who wore the clerical habit, and were trimmed with the clerical tonsure. But in those days of ignorance and superstition, a much wider and more comprehensive criterion was established : the ability to read being a mark of great erudition ; the man thus qualified was accounted a clerk or *clericus*, although neither in holy orders nor having the clerical tonsure, and was allowed the benefit of clergy. The bishop might, if he chose, claim any man who was condemned to death by the civil judge, as a clerk, if he could read ; but if neither the bishop would demand him, nor the prisoner could read, then he was executed. At length, however, by the extension of learning through the means of printing, it was discovered that fully as many laymen as clergymen could read, and in consequence enjoyed the benefit of clergy, which could not fail to excite the jealousy of the tonsured gentlemen, lest the sacredness of their order should be profaned by too great an assimilation of their privileges with the laity. A further distinction, therefore, was made in favour of the clergy, which was, that a *layman* should not be entitled to the benefit of clergy more than once ;\* whereas a clerk in holy orders might enjoy the *privilegium clericale* a second time, and oftener. And in order to distinguish the person of a layman from that of a clergyman, the former when admitted to this privilege was burnt with a hot iron in the brawn of the left thumb, by the gaoler in open court. It is impossible not to remark, that this privilege which the popish clergy claimed, is an irrefragable proof that the charges of all historians of the wickedness of their lives before the Reformation, and their shameless dissolution of morals, were perfectly true, and not the least over-drawn.

Formerly, the laity after burning, and the clergy without it, were discharged from the civil courts, and given over to the bishop's jurisdiction, where he was purged by a mock trial of twelve clerks before the bishop himself, or his deputy : when the party himself was required to make

\* 4 Henry VII., c. 13.

oath of his own innocence, next the twelve compurgators swore that they believed he spoke the truth, then witnesses were examined upon oath, but only on behalf of the prisoner : and lastly, the jury were to bring in their verdict, upon oath, which usually acquitted the prisoner ! When the blessed Reformation was fully established, this complication of perjury and subornation of perjury, in the solemn farce of a mock trial—the judge, compurgators, witnesses, and jury, being all partakers in the prisoner's guilt, was entirely abolished by act of parliament.\* The wisdom of the English legislature afterwards discovered, that as learning was no extenuation, neither was ignorance any aggravation of guilt. It was therefore enacted,† that the benefit of clergy should be extended to all who were entitled to ask it, without requiring them to read by way of conditional merit ; so that when such persons were asked by the court what they had to say, why judgment of death should not be pronounced against them, they were told to kneel down and pray the benefit of the statute. And for many years before the repeal of these statutes, burning in the hand or cheek was exchanged for fine, imprisonment, whipping, &c., at the discretion of the court. But now the *privilegium clericale* having been entirely abolished in the reign of George IV., it is unnecessary to add anything farther on the subject.

**JUDGMENT.**—After conviction, by the verdict of the jury in the criminal's presence, upon a capital charge, the judge either immediately or soon after asks the prisoner whether he has anything to say in arrest of judgment ; that is, whether he can show any cause why the sentence of the law should not be passed upon him. The prisoner is not allowed to avail himself of this clemency of the law by making exceptions to the indictment ; but if his objections prove valid, the whole proceedings shall be set aside : but he may be again indicted, or he may plead a pardon in arrest of judgment, which saves the attainder and corruption of blood ; but this is not the case unless the pardon be pleaded *before* sentence is pronounced : and the blood being once corrupted, it can only be restored by an act of parliament.

Failing all the prisoner's ingenuity to arrest judgment, the judge is then to pronounce the sentence of the law which has been annexed to the crime. Of these, some are capital, which extend to the offender's life, and consist generally, in being hanged by the neck till dead : though in very atrocious crimes, other circumstances of pain, terror, or disgrace, were superadded. The sentence *now*, in all cases of treason, is decreed ‡ to be, that the persons convicted shall be drawn on a hurdle to the place of execution, and there hanged till he is dead ; that afterwards he shall be beheaded, and the body divided into four quarters, which are to be at the king's

\* 18 Eliz, c. 7.

† 5 Anne, c. 6.

‡ 54 Geo. III., c. 146.

disposal. This statute also provides that the king may, by warrant under his sign manual, direct, that the traitor shall not be drawn or hanged, but beheaded alive, and may order in what manner the body, head, and quarters, are to be disposed of. In Thistlewood's case, and those who were executed with him in 1820 for high treason, in being concerned in the Cato street conspiracy, it is remarkable that the drawing and quartering only were remitted. Formerly, traitors were embowelled alive, and quartered: and in cases of treason, committed by a female, her sentence was to be burned alive; but now they are to be drawn to the place of execution and hanged by the neck till dead.

It is one of the excellencies of the British constitution, that the *species* of punishment is not left in the breast of any judge, or even of a jury, who are all men, subject to passions, and might in some cases withhold deserved punishments through a mistaken tenderness, and in others inflict inordinate penalties from anger or revenge. Nor are discretionary fines, which in some cases courts are allowed to adjudge, any exception to the general rule; for the nature of the punishment is fixed and determinate, although the duration and quantity of it must frequently vary, according to circumstances. The discretion of the judges is regulated by law; the bill of rights declaring that *excessive* fines ought not to be imposed, nor cruel, nor *unusual* punishments inflicted; and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons before conviction are illegal and avoid.

The sentence of death is the most terrible and highest judgment of the law of England, and when it is pronounced, the immediate and inseparable consequence is *attainder*; the law now sets a note of infamy upon him, and puts him out of its protection: he is then called *attaint*, *attinctus*, stained, or blackened; he is no longer of any credit or reputation; he cannot be a witness in any court, neither is he capable of performing the functions of another man: for by an anticipation of his punishment, he is already dead in law. When judgment is once pronounced, both law and fact conspire to prove him completely guilty, and there is not the most remote possibility left of any thing being said in his favour. On judgment, therefore, of death, and not before, the *attainder* of a criminal commences, or upon such circumstances as are equivalent to judgment of death: as outlawry on a capital crime for absconding or fleeing from justice, which is a tacit confession of guilt: and therefore a man is said to be *attainted* either upon judgment of outlawry, or of death, for treason or felony. The consequences of *attainder* are forfeiture and corruption of blood. Forfeiture is two-fold,—of real and personal estates. By *attainder* in high treason, a man forfeits to the king all his lands and tenements of inheritance which he possessed at the time the treason was committed. This forfeiture destroys all intermediate sales and incumbrances, but not those con-



tracted before the fact ; and therefore a wife's jointure is not affected by her husband's treason. At the time of the union, the crime of treason in Scotland was, in many respects, by the Scottish law, different from that of treason in England, and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English ; yet it appeared necessary that a crime so nearly affecting government should both in its essence and consequences be put upon the same footing in both parts of the united kingdom. In new-modelling these laws, the Scottish nation and the English house of commons struggled hard, partly to attain and partly to acquire a total immunity from forfeiture and corruption of blood, which the house of lords as firmly resisted. At length a compromise was agreed to, which was established by statute, that the same crimes, and no other, should be treason in Scotland which are so in England, and that the English forfeitures and corruption of blood should take place in Scotland till the death of the royal exile, then claiming the throne, and then cease throughout the whole of Great Britain ; the lords artfully proposed this temporary clause, in hopes, it is said, that the prudence of succeeding parliaments would make it perpetual : which was indeed partly done \* in the year preceding the unsuccessful attempt of the gallant Charles Edward to recover the throne of his ancestors. This statute was afterwards repealed † so that the law of forfeiture in cases of high treason, is now the same as it was by the common law, or as it stood prior to the seventh year of the reign of queen Anne.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all his freehold estates during life ; and after his death all his lands and tenements in fee simple, (but not those in tail) to the king for a year and a day. The forfeitures of goods and chattels is incurred in every one of the higher kinds of offences ; in high treason, misprision of treason, petit treason, felonies of all sorts, suicide, petit larceny, standing mute, &c. There is a difference between the forfeiture of lands, and of goods and chattels. The former are not forfeited till after attainder, whilst the latter are, on conviction ; again, the forfeiture of lands has relation to the time the fact was committed, so as to avoid all intermediate sales, &c. ; but that of goods and chattels has not, so that a man forfeits those only which he possesses at the time of conviction.

Another immediate consequence of attainder is the *corruption of blood* both upwards and downwards : so that an attainted person can neither inherit lands or other hereditaments from his ancestors, retain those he is already in possession of, nor transmit by descent to any heir ; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture ; and the person attainted shall also obstruct all descents to his

\* 17 Geo. II., c. 39.

† 29 Geo. III., c. 93.

posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

**REVERSAL OF JUDGMENT.**—After judgment has been awarded, it may yet be reversed, and all its consequences set aside in two ways, either by falsifying the judgment, or by reprieve or pardon.

A judgment may be falsified in the first place *without a writ of error* for matters not apparent on the face of the record. Thus, if any judgment whatever is given by persons who had not a good authority to proceed against the person condemned, it is void: as if a commission be granted to A. and B., and twelve others, or any two of them, of whom A. or B. shall be one, to take and try indictments, all the proceedings will be *ipso facto* void, if any of the other twelve should act without the interposition of either A. or B. Formerly judgments might be reversed by *writ of error*, which lies from all inferior courts to the king's bench, and thence to the house of lords. A writ of error might have been brought for gross mistakes in the judgment or other parts of the record: as if a man found guilty of perjury should receive the judgment of felony, so also for less palpable blunders, as the want of the proper addition to the defendant's name in the indictment, and for any other similar clause. But by a late statute,\* it has been enacted that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force of arms," or "against the peace," nor for the insertion of the words, "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*, nor for that any person mentioned in the indictment, or information is designated by a name of office or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed; in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the commencement of the prosecution, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the record to have had jurisdiction over the offence. By the 21st section, it is provided that no judgment after verdict upon any indictment or information, for any felony or misdemeanor, shall be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion, nor for any misdescription of the officer returning such process, or of any of the jurors, nor because any person has served

\* 7 Geo. IV., c. 64.

upon the jury who has not been returned as a juror by the proper officer.

**REPRIEVE, OR PARDON.**—The only remaining ways of avoiding the execution of the judgment, are by a reprieve or pardon. A *reprieve*, from *reprendre*, to take back, is the withdrawal of a sentence for an interval of time, whereby the execution is suspended, and may be granted at the will of the judge, either before or after judgment. The judge frequently exercises this power whenever he is either dissatisfied with the verdict, or considers the evidence suspicious, or whenever such favourable circumstances in the prisoner's case and character appear, as induces him to apply to the king, either for an absolute or a conditional pardon. A woman capitally convicted, and pleading pregnancy, will be respited till delivered, although it is not a bar to judgment. This is a mercy dictated by the law of nature; and therefore no part of the popish persecution in the reign of queen Mary has been more justly detested than the inhuman cruelty which was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, it was again cast into the fire as a young heretic! Such is *papal* Rome; a barbarity which they never learned from *pagan* Rome, whose laws in respect of pregnant women were the same as our own. In case this plea, however, is made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire into the fact; and if they return a verdict *quick with child*, execution shall be staid generally till the next session, and so from session to session till she is either delivered, or proves, by the course of nature, not to have been with child at all; but a verdict simply of *with child* is not sufficient unless it is alive in the womb.

The law likewise requires a reprieve when the offender becomes *noncompos*, between the judgment and the execution; because with its usual lenity it argues that perhaps the convict might have offered some reason to have staid the execution of the judgment, had he been in his right mind. Or the offender may *plead* in bar of execution, either the king's pardon or an act of grace. If neither pregnancy, insanity, nor any other plea will avail to avoid the judgment and stay the consequent execution, the last and surest resort is the king's most gracious *pardon*. The king, in his coronation oath, promises to administer justice in mercy, and it is an act of his government which is entirely and peculiarly personal, and his own. He personally condemns no man, that disgraceful task he leaves to his deputies to perform; but to wield the sceptre of mercy is his own gracious act. This is a right inherent in the crown, *jure divino*, and it has been declared in parliament \* “that no other person hath the power to pardon or remit

\* 27 Henry VIII., c. 24.

any treason or felonies whatsoever : but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.”

This attribute of mercy is one of the great advantages and blessings of monarchy in general, above any other form of government ; that there is a supreme governor who has it in his power to extend mercy wherever he thinks it is deserved : who holds, as it were, a court of equity in his own breast, to soften the rigour of the general laws, in such criminal cases as merit an exemption from punishment. According to some enthusiastic theorists, pardon should be excluded in a perfect legislation, where punishments are mild but certain ; because, say they, the clemency of the prince seems a tacit disapprobation of the law. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter : or else it must be holden, what no man will seriously avow, that the situation or circumstances of the offender (though they make no alteration in the essence of the crime), ought to make no distinction in the punishment. In democratic or republican governments, this point of pardon can nowhere subsist : for in such, no one is acknowledged higher than the judge who administers the law ; and it would be impolitic for the power of judging and of pardoning also, to centre in one and the same person. This, says Montesquieu,\* would oblige him very often to contradict himself : to make and unmake his own decisions ; it would tend to confound all ideas of right and wrong among the mass of the people : as they would find it difficult to distinguish whether a prisoner were discharged by his innocence, or obtained a pardon through favour. Formerly in Holland, when there was no Stadtholder, there was no power of pardoning offenders, so it was all judgment and no mercy. But in monarchies, the king acts in a superior sphere, and though he regulates the whole government as the first mover, yet he never appears in any of its disagreeable or invidious parts. Whenever the nation sees him personally engaged, it is always in works of legislation, magnificence, or mercy and compassion. To him, therefore, the people look up as the gracious fountain of mercy and bounty ; and these constant acts of goodness coming immediately from his own hand, endear the sovereign to his people as their father and protector, and contribute more than any thing to root in their hearts that filial affection and personal loyalty, which are the marks of a religious and obedient people, and the sure establishment of a paternal monarch.

With respect to the *objects* of pardon, the king may pardon all offences merely against the crown, or the public generally, with some exceptions to this general rule : as, for instance, to preserve the liberty of the subject, the committing any man to prison out of the realm, is, by the *Habeas*

\* Spirit of Laws, b. vi. c. 5.

*Corpus act* \* made a *premunire*, and unpardonable even by the king himself; neither can the king pardon where *private* justice is principally concerned. There is also a restriction of a peculiar nature that affects the prerogative of pardoning in cases of parliamentary impeachments: viz., that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry and stop the prosecution of great and notorious offenders. Therefore, when in the reign of Charles II., the earl of Danby was impeached of high treason by the house of commons, and pleaded the king's pardon in bar of the same, the commons alleged "that there was no precedent that ever any pardon was granted to any persons impeached by the commons of high treason or other crimes, *depending the impeachment*," and thereupon resolved "that the pardon so pleaded was illegal and void, and ought not to be allowed *in bar* of the impeachment of the commons of England;" for which resolution they assigned this reason to the house of lords, "that the setting up a pardon to be a *bar* of an impeachment defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of government would be destroyed. Soon after the Revolution, the commons renewed the same claim, and voted that a pardon is not *pleadable in bar* of an impeachment." And at length it was enacted,† that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament. But after the impeachment has been solemnly heard and determined, the king's royal grace is then no farther restrained: for after the impeachment and attainder of the six lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

After the lords have delivered their sentence of guilty, it is in the power of the commons to pardon the impeached convict, by refusing to demand judgment against him; for no judgment can be pronounced by the lords till it is demanded by the commons. It was formerly a matter of doubt whether or not a dissolution of parliament abated an impeachment. But after a very full and learned discussion of the question in the impeachment of Warren Hastings, it was decided by a very large majority in both houses, that the dissolution did *not* abate the impeachment. Indeed, it is obvious that were a dissolution of parliament to render an impeachment by the commons of England void, a corrupt minister would always resort to this measure to shelter himself from the violence of the storm that had gathered round him, and which he plainly saw would eventually burst over his head and overwhelm him with disgrace and ruin.

\* 31 Car. II., c. 2.

† 12 & 13 W. and M., c. 2.

A *pardon* must be under the great seal of England. If there be any suppression of the truth, or suggestion of falsehood in a charter of pardon, the validity of the whole is destroyed ; because it is to be inferred, that the king has been deceived on the subject, otherwise he would not have granted the pardon. As general records in pardons have but a very imperfect effect, it is necessary that the conviction and attainder be particularly specified. So also in cases of treason or murder, no pardon shall be allowed, unless the defence be accurately described therein. And in murder, it must be clearly expressed whether the crime was committed by lying in wait, assault, or malice prepense. By the recent statute to which we have so frequently appealed,\* it is declared, that when the king shall be pleased to extend mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under the sign-manual, countersigned by one of the principal secretaries of state, shall grant to such offender either a free or conditional pardon ; the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal, as to the felony for which such pardon shall be so granted. This statute also contains an express condition, that neither a free nor a conditional pardon shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of such pardon.

A pardon may be *conditional*; that is, the king may extend his mercy on what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance of which the validity of the pardon will depend ; which prerogative is daily exerted in the pardon of felons, on condition of their being confined to hard labour for a stated time, or of transportation to some foreign country for life, or a term of years. The punishment of transportation was first resorted to in England in the year 1597, being the thirty-ninth year of the reign of Elizabeth. The king's pardon by charter must be specially pleaded at a proper time, that is either upon arraignment or in arrest of judgment, or in bar of execution. The necessary effect of the king's pardon is to make the offender a new man, by acquitting him of all corporal penalties and forfeitures, the consequences of his crime, and to give him a new credit and capacity. Attainder corrupts the blood, and if the pardon is not granted before that takes place, the polluted stream can only be purified by an act of parliament. But if the attainted person have a son and who has no elder brother living born before the attainder, that son may inherit his father's property ; yet if he had been born prior to the grant of the pardon, he never

\* 7 & 8 Geo. IV. c. 28

could have inherited at all, and the land will escheat *pro defectu hæredis*. Yet if an attainted person receives the king's pardon, and afterwards has a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood.

EXECUTION.—We are now called on to witness a most affecting scene ; the humiliating and terrible completion of a capital offender's punishment. Execution, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff, or his deputy : whose warrant was anciently by precept, under the judge's hand and seal, as it is still practised in the court of the lord high steward on the execution of a peer ; though in the court of the peers in parliament, it is done by writ from the king. It was afterwards established, that in case of life, the judge may command execution to be done without any writ. And the usage now is for the judge to sign the calendar or list of all the prisoner's names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, " let him be hanged by the neck." Formerly, in the days of Latin and abbreviation, the writing was "*sus per coll*," for "*suspendatur per collum*." And these words are the sheriff's only warrant for so important an act as to deprive a fellow creature of life. It may afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt issued in the king's name, and under the seal of the court, without which the sheriff cannot legally stir one step, and yet that the execution of a man should depend on a marginal note. In a note on this place, professor *Christian* says, though it be true that a marginal note of a calendar signed by the judge, is the only warrant that the sheriff has for the execution of a convict ; yet it is made with more caution and solemnity than is represented by the learned commentator. At the end of the assizes, the clerk of the assize makes out four lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, in which, if the judge has reason to vary the course of the law, he writes opposite the names of the capital convicts, *to be reprieved, respited, transported, &c.* These four calendars, being first carefully compared together by the judge and the clerk of assize, are signed by them, and one is given to the sheriff, one to the gaoler, and the judge and clerk of assize each keep another. If the sheriff does not afterwards receive a special order from the judge, he executes the judgment of the law in the usual manner, agreeably to the directions of his calendar. In every county this important subject is settled with great deliberation by the judge and the clerk of assize, before the judge leaves the assize town ; but probably in different counties with some slight variation : as in Lancashire, where no calendar is left with the gaoler, but one is sent to the secretary of state. If the judge thinks it proper to reprieve a capital convict, he sends a memorial

or certificate to the king's most excellent majesty, directed to the secretary of state's office, stating that from favourable circumstances appearing at the trial, he recommends him to his majesty's mercy, and to a pardon on condition of transportation or some other punishment : which recommendation is always attended to.

On receipt of this warrant, the sheriff is to do execution on the criminal within a convenient time ; which in the country is also left at large. A more becoming and solemn exactness is, however, used in London, both as to the warrant itself and its execution ; for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned : of which the following is a copy :—

*Warrant of execution on judgment of death, at the general gaol-delivery, in London and Middlesex.*

London and Middlesex.	}	To the sheriff of London, and to the sheriff of the county of Middlesex, and to the keeper of his majesty's gaol of Newgate.
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WHEREAS, at the session of gaol-delivery of Newgate, for the city of London and county of Middlesex, holden at Justice-Hall, in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death, for the respective offences in their several indictments mentioned : NOW, IT IS HEREBY ORDERED, that execution of the said sentence be made and done upon them, the said Patrick Mahony and Roger Jones, on Wednesday, the ninth day of this instant month of November, at the usual place of execution. AND it is his majesty's command, that execution of the said sentence upon them, the said Charles King and Mary Smith, be respited, until his majesty's pleasure touching them be farther known.

GIVEN under my hand and seal this fourth day of November, one thousand eight hundred and thirty three,

JAMES EYRE, Recorder, L.S.

In the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution, either specifying the time and place, or leaving it to the sheriff's discretion. And throughout the kingdom, in cases of murder, the judge in his sentence shall direct execution to be done on the next day but one after sentence passed. It has been held, however, by a majority of the judges, that the statute \* enacting this course is merely directory as to the time of execution ; and that notwithstanding the statute, the judge may order a prisoner convicted of murder to be executed immediately, or at any other time within forty-eight hours, as in other cases of capital convictions. The time and place of execution are not part of the judgment by any law, as has been held by the twelve judges. It has been well observed, that it is of great importance that the punishment should follow the crime as early as possible, that the prospect of gratification or advantage which tempted

\* 25 Geo. II., c. 37.



the commission of the crime, should instantly awake the attendant idea of punishment. Delay of execution only serves to separate these ideas : and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution by substituting one mode of death for another, without being himself guilty of felony. But the king can change one mode of death for another ; because this prerogative being founded in mercy, and immemorially exercised by the crown, is part of the common law. For in every instance, these exchanges have been for more merciful kinds of death. It is observable that when lord Stafford was executed for the popish plot in the reign of Charles II., the three sheriffs of London having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed ; for having been prosecuted by impeachment, they entertained a notion, (which is said to have been countenanced by lord Russell,) that the king could not pardon any part of the sentence. The lords resolved that the sheriff's scruples were unnecessary, and declared that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified to the house of commons, by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it, and then sullenly resolved that the house was content that the sheriffs do execute lord Stafford, by severing his head from his body. It is further related, that when the same lord Russell was himself afterwards condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, sarcastically observed, that " his lordship would now find that he was possessed of that prerogative, which in the case of lord Stafford he had denied him."

A common opinion prevails, that if after hanging the usual time, a person should be cut down, and revive by any means, the law has no longer any demand on him, but this is a great mistake : for as he was sentenced to be hanged by the neck *till he was dead*, the former was not an execution of the sentence : and, therefore, the sheriff at his peril must hang him again till the law's extent be fulfilled ; for if a false tenderness were indulged in such cases, a multitude of collusions might ensue.

We have now attended the unhappy criminal, from his first apprehension by the constable, through all the stages of his trial to his final execution. How happily might not the felon have lived in society, had he not broken God's holy laws and commandments, and wilfully violated those wise and equitable human laws which are grounded on the ten commandments, and which merely required his obedience, in return for the constant protection which they afforded him against the oppressions of others. We have seen how surely and closely punishment treads on the heels of transgression.

sion ; we have seen that the English code of criminal justice is not a system of relentless cruelty, but of wisdom and compassion ; we have observed with what care and jealousy the laws watch over the life, the liberty, and the property even of the meanest subject ; we have seen that the guilty often escape the vengeance of the law through the most trifling circumstance ; and that the wise institution of a grand as well as a petit jury, almost to a certainty secures an innocent man from punishment ; we have admired that clemency of the law which even after judgment creates a *peradventure* that the criminal may yet escape with his life ; we have beheld how the royal prerogative of pardon is calculated to soften the rigour of the law, when its strict execution would be too severe : and we contemplate with satisfaction and gratitude, that it cannot fail to be exercised upon all suitable occasions, whilst God himself keeps the hearts of kings in his own hand.\*

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## THE RISE, PROGRESS, AND GRADUAL IMPROVEMENT OF THE LAWS OF ENGLAND.

WHAT is at present proposed is only to mark out some outlines of English juridical history, by taking a chronological view of the state of the laws, and their successive mutations at different periods of time ; and the several periods under which they will be considered are the following six :—

- I. From the earliest times to the Norman conquest.
- II. From the Norman conquest to the reign of Edward I.
- III. From thence to the Reformation.
- IV. From the Reformation to the Restoration of king Charles II.
- V. From thence to the Revolution, 1688.
- VI. From thence to the present times.

I. And first, with regard to the ancient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries must necessarily be both fruitless and defective. However, from the account which Cæsar has handed down in his commentaries of the tenets and ancient discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain (that is, to the island of Mona or Anglesey,) to be instructed ; we may collect a few points which bear a great affinity and resemblance to some of the modern doctrines of

\* Blackstone's Commentaries, with professor Christian's Notes—Custance on the Constitution—Statutes at large.

the English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age by custom and tradition merely, seems to have been derived from Druidical practice, who never committed any of their instructions to writing, unquestionably from the want of letters, since it is remarkable that in all the antiquities (unquestionably British) which modern industry has discovered, there is not the least trace of any character or letter in any of them to be found. The partible quality, also, of lands, by the custom of gravel-kind, which still obtains in many parts of England, and universally prevailed all over Wales till the reign of Henry VIII., is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also mention an instance of a slighter nature, mentioned under the head of treason, where the same custom has continued since Cæsar's time, although it has now been altered by statute, 30 Geo. III., that of burning a woman guilty of the crime of petty treason by killing her husband. The law now determines by the above statute that women guilty of petit treason shall no longer be sentenced to be burnt, but that in all such cases they shall be subject besides to the same judgment with regard to dissection and the time of execution, as is customary in cases of murder.

The great variety of nations that successively broke in upon and destroyed both the British inhabitants and constitution,—the Romans, the Picts, and after them the various clans of Saxons and Danes,—must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom, as they were very soon incorporated and blended together, and therefore we may suppose materially communicated to each other their respective usages in regard to the rights of property and the punishment of crimes.\* So that it is morally impossible to trace out with any degree of accuracy *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce with certainty, that *this* custom was derived from the Britons; that *that* was left behind by the Romans; that *this* was a necessary precaution against the Picts; or that *that* was introduced by the Saxons, discontinued by the Danes, and afterwards restored by the Normans.

Wherever this can be done, it is matter of great curiosity, and perhaps of some use; but this can very rarely be the case, not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general, which being accommodated to the exigencies

\* Hallam's Hist. c. L. 62

of the times, suffer by degrees insensible variations in practice : \* so that though, upon comparison, we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes that the bed of a river undergoes which gradually and imperceptibly varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable, from the antiquity of the kingdom and its government : which, although it had never been disturbed by foreign invasions, would alone make it impossible to search out the original of its laws, unless we had as effectual monuments thereof as the Jews had by the hands of Moses. † Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby Christianity was propagated among the Saxon inhabitants of England, by learned foreigners, brought over from Rome and other countries, who undoubtedly introduced many of their own national customs, and probably prevailed on the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more in conformity with its precepts. And this may have been partly the cause, that we not only find some rules of the Mosaical, but also of the imperial and pontifical laws, blended with and adopted into our system.

A further reason may also be given for the great variety, and of course the uncertain original, of many ancient established customs ; even after the Saxon government was firmly established in England, viz.—the subdivision of the kingdom into a heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws : even though all those colonies of Jutes, Angles, Anglo-Saxons and the like, originally sprang from the same mother country, the great northern hive, which poured forth its warlike progeny, and swarmed all over Europe in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into any provincial establishments, and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When, therefore, the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a magnificent and necessary work, which he is said to have executed in as masterly a manner : no less than to new-model the constitution—to

\* Hallam's Hist. c. 57.

† Hallam.

rebuild it on a plan that should endure for ages, and out of its old and discordant materials, which were heaped on each other in vast and rude irregularity, to form one uniform and well connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his immediate neighbours ; for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties : all under the influence and administration of one sovereign, the king, in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispensed to every part of the nation by distinct, yet communicating ducts and channels ; which wise institution has been preserved for upwards of a thousand years, from Alfred's time to the present. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his *som-bec*, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county court, the court-leet and sheriff's tourn ; tribunals which he established for the trial of all causes, civil and criminal, in the very districts wherein the complaint arose ; all of them subject, however, to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts : which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric : but a plan so excellently concerted could never be long thrown aside, so that upon the expulsion of these intruders, the English returned to their ancient laws : retaining, however, some few of the customs of their late visitants, which were denominated *Dane-lage* : as those compiled by Alfred was called the *West-Saxon-lage* ; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen-lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm ; the provincial polity of counties and their subdivisions having never been altered or discontinued through all the shocks and mutations of government, from its first institution : though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

For king Edgar, (who, besides his military merit as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws prevailing at once in separate parts of his dominions, projected and began what his grandson, Edward the

Confessor, afterwards completed : viz.—one uniform digest or body of laws to be observed throughout the whole kingdom, being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience ; particularly the incorporation of some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-lage*, which was still the fundamental code of the whole. And this appears to be the best supported and most plausible conjecture, (for certainty cannot be expected) of the rise and original of that admirable system of maxims and unwritten customs which is now known by the name of the *common law*, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws, we may reckon, 1st, The constitution of parliaments, or rather general assemblies of the bishops and wisest men in the nation ; “ king Alfred obtained for a perpetual usage that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people : how they should keep themselves from sin, should live in quiet, and should receive right ;”\* the *Wittena-gemotte* of the ancient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made, or old one altered. 2nd, The election of their magistrates by the people. But that of all subordinate magistrates, their military officers or heretocks, their sheriffs, their conservators of the peace, their coroners, their portereves, (since changed into mayors and bailiffs,) and even their tything men and householders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles on which it has ever since continued : only that perhaps in cases of minority, the next of kin of full age would ascend the throne as king, and not as protector, though after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence : even the most notorious offenders being allowed to commute it for a fine or *weregild*, or in default of payment, perpetual bondage ; to which the benefit of clergy afterwards in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services, in proportion to every man's land, which much resembled the feudal constitution ; but yet were exempt from all its rigorous hardships ; and which may be well enough accounted for by supposing them to be brought from the continent by the first Saxon invaders, in the

\* Blackstone, Vol. I., 117.

primitive moderation and simplicity of the feudal law, before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That those estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though really inconvenient, and more especially destructive to ancient families: which are necessary to be supported in monarchies, in order to form and keep up a nobility or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight and nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, according to the place where he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by king Alonzo VII. of Castile, about a century after the conquest: who at the same three great feasts, was in the habit of assembling his nobility and prelates in his court: who there heard and decided all controversies, and then having received his instructions departed home.\* These county courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together: the bishop and the ealdorman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials among a people which had a very strong tincture of superstition were permitted to be by *ordeal*, by the *corsned* or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*; for whether their juries consisted of precisely twelve men or not, or were bound to a strict unanimity, yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. In this state stood the general frame of our polity at the time of the Norman invasion; when the second period of the legal history of England commences.

II. This important event wrought as great an alteration in the laws of England as it did in the ancient line of her kings: and though the alteration of the former was effected rather by the consent of the people than by any right of conquest, yet that consent seems to have been partly extorted by

\* Modern Un. Hist. xx. 114.

fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations, we may reckon the separation of the ecclesiastical courts from the civil, which was effected in order to ingratiate the new king with the popish clergy, who, for some time before, had been endeavouring, all over Europe, to exempt themselves from the secular power ; and with whose demands the conqueror, like a politic prince, thought it prudent to comply, by reason that their reputed sanctity had a great influence over the minds of the people, and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interest. And this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution, consisted in the depopulation of whole counties for the purposes of the king's royal diversion, and subjecting both them and all the ancient forests of the kingdom to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made nearly as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it on his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone ; and no man was allowed to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the amusement of the sovereign, without express license from the king by a grant of a chase or free warren ; and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game laws, now arrived to, and wantoning in, its highest vigour, both founded on the same notions of permanent property in wild creatures, and both productive of the same tyranny to the commons ; but with this difference, that the forest laws established only *one* mighty hunter throughout the whole realm, whereas the game laws have raised up a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern ; for the king's grantee of a chase or free warren might kill game in any part of his franchise, but now though a freeholder of less than £100 per annum is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he has a grant of free warren) can do it without committing a trespass, and subjecting himself to an action.

3. A third alteration of the English laws was by narrowing the remedial



influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end, the *aula regis*, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and even formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were imported from the duchy of Normandy; and the natural consequence was an ordination, that all proceedings in the king's courts should be carried on in the Norman, instead of the English language,—a provision the more necessary, because none of his Norman justiciaries understood English; but it was as evident a badge of slavery as ever was imposed on a conquered people. This lasted till king Edward III. obtained a double victory over the armies of France in their own country, and their language in the courts of law at home. But there was one mischief too deeply rooted thereby, and which king Edward's caution came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed, that age, and those immediately succeeding it, were the era of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch in whatever employment, by the accidents of time or place, the general plan of education, or customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all either soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed, were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators, which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed in the infancy of a rising state, were those of the noblest kind,—the establishment of religion, and the regulations of civil polity,—yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were, therefore, frittered into logical distinctions, and drawn up into metaphysical subtleties, with a most amazingly artificial skill, but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property; which

refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they in a great measure did) the more homely but more intelligible maxims of distributive justice among the Saxons. And to say the truth, these scholastic reformers have transmitted their dialect and finesse to posterity, so interwoven in the body of our legal polity, that they cannot be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded; but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which, for a long time, was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations, but was first reduced to regular and stated forms among the Burgundi, about the close of the fifth century; and from them it passed to other nations, particularly the Franks and the Normans, which last had the honour to establish it here, though clearly an unchristian, as well as a most uncertain, method of trial. But it was a sufficient recommendation of it to the Conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in the civil and military polity of England, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; such as aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienations; the genuine consequences of the maxim, that all the lands in England were derived from, and holden either mediately or immediately of, the crown.

At this period, the nation seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious, and a politic prince to create. Men's consciences were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived, who imported from Rome, for the *first time*, the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as the doctrines of purgatory, communion in one kind, and the worship of saints and images, not forgetting the universal supremacy and dogmatical infallibility of the *holy see*. The laws too, as well as the prayers, were administered in an unknown tongue.

The ancient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all companies being obliged to disperse, and fires and candles to be extinguished by eight o'clock at night, at the sound of the melancholy *curfew*, which "toll'd the knell of parting day." The ultimate property of all lands, and a considerable share of the profits even, were vested in the king, or by him granted out to his Norman favourites, who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *militēs*; who were bound upon pain of the confiscation of their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade or foreign merchandize, such as it then was, was carried on by the Jews and Lombards, and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe; the nation consisting wholly of the Romish clergy, who were besides the lawyers; the barons or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who, from their insignificance, happily retained in their soccage and burgage tenures, some points of their ancient freedom. All the rest were villeins or bondsmen.

From so complete and well concerted a scheme of servility, it has cost our ancestors the work of generations to redeem themselves and their posterity, and secure to us that state of liberty which we now enjoy, and which therefore is not to be looked upon merely as encroachments on the crown, and infringements on the prerogative; but as, in general, a gradual restoration by royal grace, and concession of that ancient constitution whereof the Anglo-Saxons had been unjustly deprived, partly by the policy and partly by the violence of the Norman arms. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and, in some points, extended it, particularly with regard to the forest laws. But his brother and successor Henry I. found it expedient, when he first came to the crown, to ingratiate himself with the people by restoring, as the monkish historians relate, the laws of king Edward the confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures: but reserved the tenures themselves for the same military purposes that induced his father to introduce them. He also abolished the obnoxious *curfew*;

for though it is mentioned in the law a full century afterwards, yet it is rather spoken of as a known *time* of night, than as a still subsisting custom. A code of laws in his name is extant, consisting partly of those of the Confessor, but with great additions and alterations of his own ; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, and, in this code, theft was made a capital crime : a few things relating to estates, particularly regulating the descent of lands, were inserted in this code. The descent of lands by the Saxon law being equally to all the sons, by the feudal or Norman to the eldest only, king Henry here moderated the difference, directing the eldest son to have only the principal estate, "*primum patris feudum*;" the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots ; reserving, however, those ensigns of patronage, *conge d'elire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by the Romish clergy of Norman extraction ; and upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time ; from whence we may easily perceive how far short this was of a thorough restitution of king Edward's or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with respect to redressing the grievances of the forest laws, but performed no great matter in that or any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into the realm of England ; and at the same time, the absurd and pernicious doctrine of appeal to the court of Rome was, during this usurpation, first imported as a branch of the canon law.

By the time of Henry II., if not earlier, the charter of Henry I. seems to have been forgotten ; for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being, as all God's institutions undoubtedly are, found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws, and reduce them into a regular order ; as appears from that excellent treatise of Glanvil, which, though some of it be now antiquated and altered, yet, when compared with the code of Henry I., it carries a manifest superiority. Throughout his reign the important struggle between the laws of England and of Rome was continued, and which will be more fully noticed under our notice of "The Supreme Head of the Church ;" the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter

by the popish clergy : which dispute was kept on foot till the reign of Edward I., when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the reign of Henry II., there are four things which particularly merit the attention of a legal antiquarian. 1. The constitutions of the parliament at Clarendon in the year 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption which they claimed from the secular jurisdiction ; though his further progress was unhappily stopped by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere* ; the king having divided the kingdom into six circuits (a little different from the present), and commissioned these newly created judges to administer justice and try writs of assize in the several counties. These remedies are said to have been then first invented ; before which time all causes were usually terminated in the county courts, according to the Saxon custom ; or before the king's judiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors ; and the former, however suitable for little debts and minute actions, where procrastination is a very great evil, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of *escuage*, or pecuniary commutation for personal military service ; which, in process of time, was the parent of the ancient subsidies granted to the crown by parliament, and the land-tax of later times.

Richard I., a brave and magnanimous prince, was a sportsman as well as a soldier, and therefore enforced the forest laws with considerable rigour, which occasioned many discontents among his people ; though, according to Matthew Paris, he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting, probably finding that their severity prevented prosecutions. While abroad, he also composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority ; for in his time it was again discovered, that, being insular, we were naturally a maritime power. But with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre,—this king's thoughts being chiefly taken up by the absurd popish knight-errantry of a crusade against the Saracens in the Holy Land.

In king John's time, and that of his son Henry III., the rigours of the

feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which at last had this effect, that king John first, and afterwards his son, consented to the two famous charters of English liberties, *magna charta* and *carta de foresta*. Of these, the latter was well calculated to redress many grievances and encroachments of the crown in the exercise of forest law; and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time, though now, unless considered attentively and with retrospect, they seem but of trifling concern. But besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited, for the future, grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower as it has ever since continued; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragement to commerce, by the protection of foreign merchants; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed by following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquest for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff-tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom; and, lastly (which alone would have merited the title that it bears of the *Great Charter*), it protected every individual of the nation in the free enjoyment of his life, liberty, and property, unless the same should be declared forfeited by the judgment of his peers, or the law of the land. We beg to direct the attention of our readers to *MAGNA CHARTA* itself, a translation

of which we have given, page 33, with a few explanatory remarks preceding it.

By means of the rebellion of the barons, and the struggles in which the king and the nation were engaged, the pope contrived to gain a still greater ascendancy in England than he had ever enjoyed before, which continued through the long reign of his son Henry III., in the beginning of whose reign the old Saxon trial by ordeal was also totally abolished: and we may by this time perceive in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in point of pleadings.\* Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III., and that towards the end of the latter of these reigns, we find the *first record of any writ for summoning knights, citizens, and burgesses, to parliament*. And here we conclude the second period of English legal history.

III. The third period commences with the reign of Edward I., who has justly been styled the English Justinian; for, in his time, the law received so sudden a perfection, that Sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of the reign of that monarch to settle and establish the distributive justice of the kingdom, than in all the ages since that put together, until Sir Matthew's own time. †

It would be endless to enumerate all the particulars of these regulations: but the principal may be reduced under the following general heads:—

1. He established, confirmed, and settled the great charter and charter of forests.
2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased.
3. He defined the limits of the several temporal courts of the highest jurisdiction—those of the king's bench, common pleas, and exchequer, so as they might not interfere with each other's proper business; to do which they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property.
4. He settled the boundaries of the inferior courts in counties, hundreds, and manors; confining them to causes of no great amount, according to their primitive institution, though of considerably greater than, by the alteration of the value of money, they are now permitted to determine.
5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council.
6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere

\* Hallam's History, c. 156.

† Hallam's History.

in private causes. 7. He settled the form, solemnities, and effect of fines, levied in the court of common pleas, though the thing in itself was of Saxon original. 8. He first established a repository for the public records of the kingdom, few of which are of more ancient date than the reign of his father; and those were by him collected. 9. He improved upon the laws of king Alfred, by the great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *eligit*, which was of signal benefit to a trading people; and upon the same commercial ideas, he allowed the charging of lands in a statute-merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights in which, before, the law was extremely deficient. 13. He also closed the great gulf in which all the landed property in the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain, most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates-tail; concerning the good policy of which, however, modern times have entertained a very different opinion. 15. He reduced all Wales, not only to the subjection of the crown, but, in a great measure, to the laws of England (which was thoroughly completed in the reign of Henry VIII.), and he seems to have entertained the same design on Scotland, so as to have formed an entire and complete union of the island of Great Britain.

This catalogue might be continued much farther; but, on the whole, we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; and has continued nearly the same, in all succeeding ages, to this day, abating some few alterations which the humour or necessity of subsequent times has occasioned.\* The forms of writ by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, nor formal. The legal treatises written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least *were* so till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation of magna charta*, rather than from its making or renewal in the days

\* Hallam's History.



of his grandfather and father, that the liberty of Englishmen began again to rear its head ; though the weight of the military tenures hung heavily upon it for many ages afterwards.

A better proof of the excellence of his institutions cannot be given, than that from this time to that of Henry VIII., there happened very few alterations in the legal forms of procedures, and these but very inconsiderable. As to matter of *substance*, the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III., and, instead of the latter, justices of the peace were established. Also, in the reign of Edward III. parliament is supposed most probably to have assumed its present form, by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly, and the translation of the law proceedings from French into Latin, another. Much also was done under the auspices of this magnanimous prince, for establishing our domestic manufactures, by prohibiting the exportation of English wool, and the importation or the wearing of foreign cloths and furs ; and by encouraging cloth workers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general : for, in particular, it enlarged the credit of the merchant, by introducing the statute-staple, whereby he might more readily pledge his lands for the security of his mercantile debts. And as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators, particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the ordinary's officers, to uses then denominated pious. The statutes also of *præmunire* for effectually depressing the pope's civil power, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century, though the seeds of the general reformation which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular (or monkish) clergy.

From this time to that of Henry VIII., the civil wars and disputed titles to the crown, gave no leisure for further juridical improvements ; "*nam silent leges inter arma*." And yet it is to these very disputes and usurpations that we owe the happy loss of all the dominions of the crown in France, which had the beneficial effect of turning the minds of subsequent princes entirely to domestic concerns. To these, likewise, we owe the method of barring entails by the fiction of *common recoveries*, invented

originally by the Romish clergy, to evade the statutes of mortmain, but introduced under Edward IV. for the purpose of unfettering estates, and making them more liable to forfeiture; while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*,—another of the popish inventions.

In the reign of Henry VII., his ministers, if not the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's coffers, by every means that could be devised; and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers the most dangerous and unconstitutional, over both the persons and properties of the subject. Informations were allowed to be received in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might, in consequence, be outlawed; because, after such outlawry, the goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of the legal history of England, viz. the Reformation of religion under Henry VIII. and his children, which, in ecclesiastical matters, opens up an entirely new scene: the usurped power of the pope being now, it is devoutly to be hoped, routed and destroyed (unless the Roman Catholic relief bill of 1829 may pave the way for his encroachments), all his connexions with this island cut off, the crown restored to its supremacy over the clergy and their causes, and the patronage of bishoprics being once more indisputably vested in the king. And if at this time the spiritual courts had been re-united to the civil, we should have seen the old Saxon constitution, with regard to *ecclesiastical* polity, completely restored.\*

With regard also to our *civil* polity: the statute of wills, and the statute of uses, both passed in the reign of this prince, made a great alteration as to property; the former allowing the *devise* of real estates by will, which

\* See Art. *Supremacy of the Crown*.

before was in general forbidden ; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction dictated by common justice and common sense, which, however arbitrarily exercised, or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence ; the principles of which, notwithstanding their difference of forms, are now equally adopted by the courts both of law and equity. From the statute of *uses*, and another statute of the same antiquity (which protected estates for years from being destroyed by the reversioner), a remarkable alteration took place in the mode of conveyancing, the ancient assurance by feoffment, and living upon the land being now very seldom practised ; since the more easy and more private invention of transferring property, by secret conveyances, to uses and long terms of years, being now continually created in mortgages and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks, in this reign, upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law before the passing of the statute *de donis*, the establishment of recognizances in the nature of a statute-staple for facilitating the raising of money upon landed security, and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate trader,—all these were capital alterations of our legal polity, and highly convenient to that character which the English began about this time to re-assume of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy, and, together with the numerous improvements before observed, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the reign of Henry VIII. a very distinguished era in the annals of juridical history.

It must, however, be remarked, that the royal prerogative was then, but particularly in his latter years, strained to a very tyrannical and oppressive height ; and what was the worst circumstance, its encroachments were established by law, under the sanction of parliament, one of which passed a statute enacting, that the king's proclamations should have the force of acts of parliament ; and others concurred in the following heap of wild and new-fangled treasons, invented in this reign : the offence of clipping money ; breaking prison, or rescue, when the prisoner is committed for treason ; burning houses to extort money ; stealing cattle by Welshmen ; counterfeiting foreign coin ; wilful poisoning ; execrations against the king,

calling him opprobrious names by public writing ; counterfeiting the sign manual or signet ; refusing to abjure the pope ; deflowering, or marrying without the royal license, any of the king's children, sisters, aunts, nephews, or nieces ; bare solicitation of the chastity of the queen or princesses, or advances made by themselves ; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life ; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleves ; derogating from the king's royal style and title ; impugning his supremacy ; and assembling riotously to the number of twelve, and not dispersing on proclamation ; all which new-fangled treasons were, however, totally abrogated by the statute of Mary,\* which once more reduced all treasons to the standard of the statute of 25 Edward III., since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased. Happily for the nation, his arbitrary reign was succeeded by the minority of an amiable prince, during the short sunshine of whose reign, great part of these extravagant laws were repealed. And to do justice to the shorter and inglorious reign of bloody Mary, many salutary and popular laws were made in civil matters under her administration, —perhaps the better to reconcile the people to the persecuting measures which she was induced to pursue for the re-establishment of religious slavery ; the well-concerted schemes for effecting which, were, through the good providence of God, defeated by her seasonable death, and the happy accession of Elizabeth.

The religious liberties of the nation being, by that happy event, established—we sincerely hope on an eternal basis—though obliged, in their infancy, to be guarded against papists and other non-conformists by laws of too sanguinary a nature ; the forest laws having fallen into disuse, and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward I., without any material innovations, all the principal grievances introduced by the Norman conquest, seem to have been gradually shaken off, and the Saxon constitution restored, with considerable improvements ; except only in the continuation of the military tenures, and a few other points, which still armed the crown with a prerogative that might be oppressive and dangerous. It is also to be remarked, that the spirit of enriching the clergy, and endowing religious houses, had, through its former abuse, gone to such a contrary extreme, and the princes of the house of Tudor, and their favourites, had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the restraining statutes, to prevent the aliena-

\* Mary 1. c. 1.

tion of lands and tithes belonging to the church and universities. The number of indigent persons being also increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even the feeding and clothing of millions, by affording them the means, with their own industry, of feeding and clothing themselves. And the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their attempts have proved.\*

Considering the reign of queen Elizabeth in an enlarged and political view, we have no reason to regret many subsequent alterations in the constitution. For though, in general, she was a wise and excellent princess, and loved her people; though, in her time, trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliament at a very awful distance; and, in many instances, she carried the prerogative as high as any of her most arbitrary predecessors. It is true she very seldom exercised this prerogative so as to oppress individuals, but still she possessed the power to exert it; and therefore the felicity of her reign depended more on her want of opportunity, than the want of either the power or the inclination to play the tyrant. This is a high encomium on her merit, but, at the same time, it is sufficient to show, that hers were not those golden days of genuine liberty that we have been taught to believe.

The great revolutions that had happened both in manners and property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government; yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards contributed to reduce its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance: before the extension of trade, their personal wealth was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feudal lord, who was usually some powerful baron, some opulent abbot, or sometimes the king himself. Though a notion of general liberty strongly pervaded and animated the whole constitution, yet the particular and personal independence which we now enjoy, was little regarded or thought of, and even to assert them, was treated as sedition, if not rebellion.

But when, by the invention of printing, learning and the progress of

\* For a full account of this institution, see article on Poor Laws.

religious reformation began to be universally disseminated ; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discoveries of the Indies,—men's minds, being enlightened by science, and enlarged by observation and travel, began to entertain juster ideas of their own weight in society, and of their rights and privileges. An inundation of wealth flowed in upon the mercantile and middling ranks ; while the two first estates of the kingdom, the nobility and clergy, which had formerly balanced the prerogative, were greatly weakened and impoverished. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which are too apt to be introduced by knowledge, foreign travel, and the progress of the politer arts), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses ; to gratify which, they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within the bounds of moderation ; while, by the spoils of the monasteries and the great increase of the customs, they grew rich, independent, and haughty ; but the commons were not yet sensible of the strength they had acquired through this silent change, which had gradually taken place. Intent on acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamt of opposing the prerogative, much less of taking the lead in opposition. The latter years, therefore, of Henry VIII., were the times of the greatest despotism that had ever been known in this island since the death of William the Conqueror.

Queen Elizabeth, and the intermediate princes of the house of Tudor, had almost the same legal powers, and sometimes exerted them as roughly as their father Henry VIII. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of her cousin the queen of Scots, occasioned greater caution in her conduct. She herself, or, at all events, her able advisers, had sufficient penetration to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of the prerogative, which was never wantonly drawn aside except to answer some important purpose ; and though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, and her wisdom, that never did a prince be-

fore her, so long and so entirely, for the space of nearly half a century, reign in the affections of her people.

James I., on his accession, neither added nor exercised any new degree of royal power. The imprudent and sometimes unreasonable exertion of the ancient and undoubted prerogatives of the crown, upon trivial and unimportant occasions, and the imprudent *talking* of prerogatives which other princes before and since have silently *exercised*, and also claiming an absolute power which he had not the inclination to practise, together with the religious fanaticism which began to work in his reign, roused the people to resist the imputation of arbitrary power and that moderate authority without which he could never have carried on his government, and they gained some victories over the crown in cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes.

The unfortunate Charles I. had been educated in higher notions of the royal prerogative than were agreeable to the popular notion then fast gaining ground, and he began his reign in conformity. His parliaments refusing to grant supplies, he was compelled to exert the obsolete prerogatives of the crown in order to raise money for carrying on a war in which he found himself involved at his succession. He, however, consented to the petition of right which was expressly enacted to abolish several of the prerogatives, which he had carried higher than his predecessors, owing to the difficulties in which the refusal of the commons to grant supplies had compelled him, for the ordinary expenses of the government, to resort, such as the levies of tonnage and poundage, ship money,\* and some others, all which the king redressed in a constitutional way in parliament, before the rebellion broke out, by the several statutes for triennial parliaments; for abolishing the star-chamber and high commission courts; for ascertaining the extent of the forests and forest laws; for renouncing ship money and other exactions; and for giving up the prerogative of knighting the king's

\* Ship money was an imposition, charged upon the ports, towns, cities, boroughs, and counties of England, by writs commonly called ship-writs, under the great seal of England, in the years 1635 and 1636, for providing and furnishing certain ships for the king's service; and for which they were allowed to compound for an equivalent in money, which was in fact all that the king wanted, to which shift he was driven by the commons refusing to vote supplies. In order to give this unusual mode of raising money a legal qualification, Charles required the opinions of the twelve judges, who solemnly decided that it was legal and constitutional. Those who had before complied with this unconstitutional requisition as a *free gift*, or *benevolence*, to assist the king in his distress, now refused to grant it as a matter of right, which might become a permanent assessment and a grievous burden on the nation. It was accordingly moved in parliament, and the king consented to the act, declaring "it to be contrary to the laws and statutes of this realm, the petition of right, and liberty of the subject."—17 Char. I., c. 14.

tenants *in capite*, in consequence of their feudal tenures : these concessions stimulated the people to demand more and greater concessions, rather than satisfied them ; and as the king found that there was a point at which concession must stop, the people became irritable, and being wrought on by the arts of the king's enemies, they believed him to be insincere—a great misfortune for a magnanimous prince ; he was, besides, betrayed by his councillors and ministers ; and the parliamentary leaders joining the military, which was in a state of open rebellion against the crown, and inflamed with religious animosity and fanaticism, overturned both the established church and the monarchy, and, after a mock trial, murdered their amiable and unfortunate king.

V. It is unnecessary to revert to the period of the commonwealth which followed the grand rebellion, because nothing was done in ameliorating the feudal tenures till the restoration of Charles II., immediately on which, the principal remaining grievance—the doctrine and consequences of military tenures—was taken away and abolished, except in the instance of corruption of inheritable blood on the attainder of treason and felony, by the act 12 Car. II. c. 24,—“ Whereas, &c. 1. That the courts of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriage by reason of any tenure of the king's majesty, or of any other by knights-service, and all mean rates, and all other gifts, grants, charges incident or arising for, or by reason of, wardships, &c., be taken away and discharged. And that all fines for alienations, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising for or by reason of wardship, livery, primer seisin, or ousterlemain, or tenure by knights-service, escuage, &c., and all other charges incident thereto, be likewise taken away and discharged. And that all tenures by knights-service of the king, or of any other person, and by knights-service *in capite*, and by soccage *in capite* of the king, and the fruits and consequents thereof, be taken away and discharged. And all tenures of any honours, manors, lands, tenements, or hereditaments, or any estate of any inheritance at the common law, held either of the king, or of any other person, or bodies politic or corporate, are hereby enacted to be turned into free and common soccage. 2. And that the same shall for ever hereafter stand and be discharged of all tenure by homage, escuage, voyages royal, and charges for the same, wardships incident to tenure by knights-service, and values and forfeitures of marriage, and all other charges incident to tenure by knights-service, &c., and that all conveyances and devises of any manors, lands, tenements, and hereditaments, shall be expounded to be of such effect as if the same manors, lands, tenements, and hereditaments had been then held and continued to be holden in free and common soccage only. 11. Provided that neither this act, nor any thing therein contained, shall infringe or hurt any title of ho-



nour, feudal or other, by which any person hath or may have right to sit in the lords' house of parliament, as to his or their title of honour or sitting in parliament, and the privilege belonging to them as peers. 13. His majesty is therefore graciously pleased that it may be enacted, that from henceforth no sum or sums of money or other thing shall be taken, raised, taxed, rated, imposed, paid, or levied for, or in regard of any provision, carriages, or purveyance for his majesty, his heirs, or successors. 14. No pre-emption shall be allowed or claimed in behalf of his majesty, or any of his heirs or successors, or of any of the queens of England, or of any of the children of the royal family for the time being, in market or out of market; but that it be for ever hereafter free to all and any of his majesty's subjects to sell, dispose, or employ his said goods to any other person or persons as himself listeth, any pretence of making provision or purveyance of victual, carriages, or other things for their majesties, &c., or any pretence of pre-emption in their or any of their behalfs notwithstanding."

Charles II. not only restored the English church and monarchy, but, by a concurrence of happy circumstances, English liberty was completely established upon a firm basis for the first time since its total abolition by William the Conqueror. For not only all these slavish tenures, with all their oppressive appendages, the badge of foreign dominion, were removed from encumbering the estates of the subject; but he also conferred an additional security to the person of the subject from imprisonment, by that great bulwark of the constitution, the *habeas corpus* act. These two statutes, with respect of properties and persons, form a second *magna charta*, more beneficial and effectual than that of Runnimeade. King John's unwillingly conceded act, merely pruned some of the luxuriances of the feudal system; but king Charles's willingly bestowed charter, extirpated all the slavery and bondage of the Norman conqueror: the former only relieved the nobility, and was of no service to the great mass of the people; but the latter made the *people* essentially free and independent, and they are indebted for this, to the patriotic act of a native prince, of a family that it has been too much the custom to revile. *Magna Charta* only declared in general terms, that no man shall be imprisoned contrary to law; but the *habeas corpus* act, points out the effectual means, as well to release himself, as to punish all those who shall thus unconstitutionally misuse him.

To these may be added the statutes\* for holding triennial parliaments; the test and corporation acts, which secured both civil and religious liberty; the abolition of the writ, *de hæretico comburendo*; † the statutes of frauds and perjuries—a great and necessary security to private property; the statute for the distribution of the estates of intestates, and that of amend-

\* 16 Car. II., c. 1.

† 29 Car. II., 10.—29 Car. II., 3.

ments and *jeofails*, which cut off those superfluous niceties which had so long disgraced the courts of law, together with many other wholesome acts that were passed in this reign, for the benefit of navigation, and the improvement of foreign commerce ;\* and, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, the whole will be sufficient to demonstrate this truth, “ that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative, was happily established by law, in the reign of king Charles II.” And what, says Blackstone, seems incontestible, is this, that by the law, after the *habeas corpus* act was passed in the year 1679, and that for licensing the press had expired, the people had as large a share of real liberty, as is consistent with a state of society ; and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which it is only necessary to appeal to the memorable catastrophe of the following reign ; for when king Charles’s deluded brother attempted to enslave the nation, by introducing popery and arbitrary power, he found it impossible. James attempted to supersede the laws by his royal proclamation, which he commanded his bishops to require their clergy to read from their pulpits. Against which, seven bishops petitioned the king, as being unconstitutional and illegal, whereupon he committed them to the Tower, and they were afterwards tried on a charge of sedition : they were honourably acquitted, and to them is the nation indebted for the preservation of our liberties. Several other arbitrary acts, with the avowed intention of restoring the pope’s supremacy, precipitated the Revolution ; and the kingdom being invaded by a foreign force, under his son-in-law the prince of Orange, James abdicated the throne of his ancestors, and in a convention of the three estates of the realm, it was declared to be VACANT.

VI. FROM THE REVOLUTION IN 1688, TO THE PRESENT TIME. In which period many important laws have been both enacted and repealed : as the Bill of Rights, already given ; the Toleration Act, which will be more particularly noticed under the article on the Dissenters ; the Act of Settlement, with its conditions ; and the following Act of Union between the kingdoms of England and Scotland.

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\* 22 & 23 Car. II., cap. 10.

# ARTICLES OF UNION BETWEEN THE KINGDOMS OF ENGLAND AND SCOTLAND,

*Ratified at London on the 22nd January, in the year 1707.*

**MOST GRACIOUS SOVEREIGN,**—Whereas, articles of Union were agreed on, the 22nd day of January, in the fifth year of your majesty's reign, by the commissioners nominated on behalf of the kingdom of England under your majesty's great seal of England, bearing date at Westminster, the 10th of April, then last past, in pursuance of an act of parliament made in England in the third year of your majesty's reign, and the commissioners nominated on behalf of the kingdom of Scotland, under your majesty's great seal of Scotland, bearing date the 27th day of February, in the fourth year of your majesty's reign, in pursuance of the 4th act of the 3d session of the present parliament of Scotland, to treat of, and concerning an union of the said kingdoms; and whereas, an act hath passed in the parliament of Scotland, at Edinburgh, the 16th day of January, in the fifth year of your majesty's reign; wherein it is mentioned, that the estates of parliament considering the said articles of union of the two kingdoms, had agreed to, and approved of, the said articles of union, with some additions and explanations; and that your majesty, with the advice and consent of the estates of parliament, for establishing the protestant religion, and presbyterian church government within the kingdom of Scotland, had passed in the same session of parliament, an act intitled "An act for the securing of the protestant religion and presbyterian church government," which by the tenor thereof was appointed to be inserted in any act ratifying the treaty, and expressly declared to be a fundamental and essential condition of the said treaty of Union, in all time coming; the tenor of which articles, as ratified and approved of, with additions and explanations by the said act of parliament of Scotland, follows:—

**ARTICLE I.** That the two kingdoms of England and Scotland shall, upon the first day of May, which shall be in the year 1707, and for ever after, be united into one kingdom, by the name of Great Britain, and that the ensigns armorial of the said united kingdom, be such as her majesty shall appoint, and the crosses of St George and St Andrew be conjoined in such manner as her majesty shall think fit; and used in all flags, banners, standards, and ensigns, both at sea and land.

**II.** That the succession of the monarchy to the united kingdom of Great Britain, and of the dominions thereunto belonging, after her most sacred majesty, and in default of issue of her majesty, be, remain, and continue to the most excellent princess Sophia, electress and duchess-dowager of Hanover, and the heirs of her body being protestants, upon whom the crown of England is settled by an act of parliament, made in England in the 12th year of the reign of his late majesty king William III., entituled "An act for the further limitation of the Crown, and better securing the rights and liberties of the subject:" and that all papists, and persons marrying papists, shall be excluded from, and for ever incapable to inherit, possess, or enjoy the imperial crown of Great Britain, and the dominions thereunto belonging, or any part thereof; and in every such case the crown and government, shall from time to time descend to, and be enjoyed by, such persons, being protestants, as should have inherited and enjoyed in case such papist, or person marrying a papist, was naturally dead, according to the provision for the descent of the crown of England, made by another act of parliament in England, in the first year of the reign of their late majesties, king William and queen Mary, intitled "An Act declaring the rights and liberties of the subject, and settling the succession of the crown."

**III.** That the united kingdom of Great Britain, be represented by one and the same parliament, to be stiled the parliament of Great Britain.

**IV.** Provides for the full freedom and intercourse of trade and navigation, with a communication of all other rights, privileges, and advantages which do or may belong to the subjects of either kingdom; except where it is otherwise expressly agreed in these articles.

**V.** That all ships or vessels belonging to her majesty's subjects of Scotland, at the time of ratifying the treaty of union of the two kingdoms in the parliament of Scotland, be deemed and pass as ships of the build of Great Britain.

VI. That all parts of the united kingdom for ever, from and after the union, shall have the same allowances, encouragements, and drawbacks, and be under the same prohibitions, restrictions, and regulations of trade, and liable to the same customs, and duties on import and export; excepting the private rights of individuals in particular cases of either kingdom. Scottish cattle carried into England, shall not be liable to any other duties, either on public or private account, than those duties to which the cattle of England are, or shall ever be liable within the said kingdom.

VII. That all parts of the united kingdom, be for ever liable to the same excises upon all excisable liquors, excepting only in the article of beer or ale.

VIII. That from and after the union, all foreign salt which shall be imported into Scotland, shall be charged at the importation there, with the same duties as the like salt is now charged with being imported into England, and to be levied and secured in the same manner. But Scotland shall, for the space of seven years from the said union, be exempted from paying in Scotland, for salt made there, the duty or excise for salt now made in England.

IX. That whosoever the sum of £1,997,763 : 8 : 4 shall be enacted by the parliament of Great Britain, to be raised in that part of the united kingdom now called England, on land and other things usually charged in acts of parliament there, for granting an aid to the crown by a land tax, that part of the united kingdom now called Scotland, shall be charged by the same act, with a further sum of £48,000, free of all charges, as the quota for Scotland to such tax; and so proportionally for any greater or lesser sum.

X. That Scotland shall not be charged with the then existing duties on stamped paper, vellum, and parchment.

XI. That Scotland shall not be charged with the then existing duties on windows and lights.

XII. That Scotland shall not be charged with the duties then charged in England on coals, culm, and cinders.

XIII. That Scotland shall not be charged with the duties then charged in England on malt.

XIV. Provides, that there shall be no further exemption insisted upon for any part of the united kingdom, but that the consideration of any exemptions shall be left to the determination of the parliament of Great Britain.

XV. Provides equivalents for any losses which private persons may sustain by reducing the coin of Scotland to the standard value of the coin of England: for the capital stock of the African and India company of Scotland. That all public debts of the kingdom of Scotland, as shall be adjusted by this present parliament, shall be paid. And that £2000 per annum, for the space of seven years, shall be applied towards encouraging and promoting the manufacture of coarse wool within those shires that produce the wool: and afterwards the same shall be wholly applied towards the encouraging and promoting the fisheries, and such other manufactures and improvements in Scotland as may most conduce to the general good of the united kingdom.

XVI. That from and after the union, the coin shall be of the same standard value, throughout the united kingdom, as now in England, and a mint shall be continued in Scotland under the same rules as the mint in England.

XVII. That the same weights and measures shall be used throughout the united kingdom as are now established in England; and standard weights and measures shall be kept by those boroughs in Scotland, to whom the keeping standards of weights and measures now in use there, does of special right belong.

XVIII. That the laws concerning the regulation of trade, customs, and such excises to which Scotland is by virtue of this treaty to be liable, be the same in Scotland, from and after the union, as in England.

XIX. That the court of session or college of justice, do after the union, remain in all time coming within Scotland, as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the union; subject, nevertheless, to such regulations, for the better administration of justice, as shall be made by the parliament of Great Britain; and that hereafter none shall be named by her majesty to be ordinary lords of session, but such who have served in the college of justice, as advocates, or principal clerks of session, for

the space of five years; or as writers to the signet for the space of ten years. All admiralty jurisdictions be under the lord high admiral, or commissioners for the admiralty of Great Britain, for the time being; and the court of admiralty now established in Scotland be continued. And all other courts now in being within the kingdom of Scotland do remain, but subject to alterations by the parliament of Great Britain; and that all inferior courts within the said limits do remain subordinate as they now are, to the supreme courts of justice within the same, in all time coming; and that no causes in Scotland be cognisable by the courts of chancery, queen's bench, common pleas, or any other court in Westminster hall; and that the said courts, or any other of the like nature, after the union, shall have no power to cognosce, review, or alter the sentences of the judicatures within Scotland, or stop the execution of the same; and that there be a court of exchequer in Scotland, for deciding questions concerning the revenues of customs and excises there, having the same power as the court of exchequer in England; and that after the union, the queen's majesty, and her royal successors, may continue a privy council in Scotland, for preserving of public peace and order, until the parliament of Great Britain shall think fit to alter it.

XX. That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life, be reserved to the owners thereof as rights of property.

XXI. That the rights and privileges of royal burghs in Scotland, as they now are, do remain entire after the union.

XXII. That by virtue of this treaty, of the peers of Scotland at the time of the union, sixteen shall be the number to sit and vote in the house of lords, and forty-five the number of the representatives of Scotland in the house of commons of the parliament of Great Britain.

XXIII. That the sixteen peers of Scotland shall have all the privileges of parliament which the peers of England now have, and particularly the right of sitting upon the trial of peers; and that all peers of Scotland and their successors to their honours and dignities, shall after the union be peers of Great Britain, and have rank and precedence next and immediately after the peers of the like orders and degrees in England, at the time of the union, and before all peers of Great Britain of the like orders and degrees who may be created after the union.

XXIV. That there be one great seal for the united kingdom of Great Britain, which shall be different from the great seal now used in either kingdom: and the said seal, and all of them, and the keepers of them, shall be subject to such regulations as the parliament of Great Britain shall hereafter make. And that the crown, sceptre, and sword of state, the records of parliament, and all other records, rolls, and registers whatsoever, both public and private, general and particular, and warrants thereof, continue to be kept as they are within that part of the united kingdom called Scotland: and that they shall remain in all time coming.

XXV. That all laws and statutes in either kingdom, so far as they are contrary to, or inconsistent with the terms of these articles or any of them, shall cease and become void. That the commissioners for the treaty of union shall not treat of or concerning any alteration of the worship, discipline, and government of the church of the kingdom of Scotland, as now by law established: and it being reasonable and necessary that the true protestant religion, as presently professed within this kingdom, with the worship, discipline, and government of this church (of Scotland), should be effectually and unalterably secured: therefore, her majesty, with the advice and consent of the said estates of parliament, doth hereby confirm and establish the said true protestant religion, and the worship, discipline, and government of the church of Scotland, to continue without any alteration, to the people of this land in all succeeding generations; and her majesty expressly provides and declares, that the true protestant religion contained in the Confession of Faith, with the form and purity of worship at present in use within that church by kirk sessions, presbyteries, provincial synods, and general assemblies, all established by stat. W. and M. 5, and that the said presbyterian government shall be the only government of the church within the kingdom of Scotland. And her majesty statutes and ordains, that in all time coming, no professors, &c., or others bearing office in any university, college, or school, be capable to be admitted, or allowed to continue in the exercise of their said functions, but such as shall own and acknowledge the civil go-

vernment in manner prescribed by the acts of parliament: as, also, that before or at their admissions, they do, and shall acknowledge, and profess, and shall subscribe to, the foresaid Confession of Faith, as the confession of *their* faith, and that they will practise and conform themselves to the worship presently in use in this church, and submit themselves to the discipline and government thereof, and never endeavour, directly or indirectly, the prejudice or subversion of the same; and that before the respective presbyteries of their bounds, by whatsoever gift, presentation, or provision they may be thereto provided. And her majesty expressly declares and statutes, that none of the subjects of the kingdom of Scotland shall be liable to, but all and every one of them for ever free of any oath, test, or subscription within this kingdom, contrary to, or inconsistent with the foresaid true protestant religion and presbyterian church government, worship, and discipline, as above established; and that the same, within the bounds of this church and kingdom, shall never be imposed or required of them in any sort. And, lastly, that after the decease of her present majesty, the sovereign succeeding to her in the royal government of the kingdom of Great Britain, shall in all time coming, at his, or her accession to the throne, swear and subscribe, that they shall inviolably maintain and preserve the foresaid settlement of the true protestant religion with the government, worship, discipline, rights, and privileges of this church (of Scotland), as above established by the laws of this kingdom, in prosecution of the claim of right.

That the commissioners shall not treat of, or concerning any alteration of the liturgy, rites, ceremonies, discipline, or government of the church, as by law established within this realm (of England). And whereas, it is reasonable and necessary, that the true protestant religion professed and established by law in the church of England, and the doctrine, worship, discipline, and government thereof, should be effectually and unalterably secured; be it enacted, &c. that the act 13 Eliz. entitled "An act for the ministers of the church to be of sound religion;" and also the act 13 Car. II., entitled "An act for the uniformity of the public prayers, and administration of the sacraments and other rites and ceremonies, and for establishing the form of making, ordaining, and consecrating bishops, priests, and deacons, in the church of England:" and all and singular other acts of parliament now in force, for the establishment and preservation of the church of England, and the doctrine, worship, discipline, and government thereof, shall remain and be in full force for ever.

And be it further enacted, that after the demise of her majesty, the sovereign next succeeding to her majesty in the royal government of the united kingdom of Great Britain, and so for ever after, any king or queen succeeding and coming to the royal government of the kingdom of Great Britain, at his or her coronation, shall, in the presence of all persons who shall be attending, assisting, or otherwise then and there present, take and subscribe an oath, to maintain and preserve inviolably the said settlement of the church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the kingdom of England and Ireland, the dominion of Wales, and town of Berwick-upon-Tweed, and the territories thereunto belonging.

And be it further enacted, that the act of parliament of Scotland, as before mentioned, for establishing the protestant religion and presbyterian church government within that kingdom, entitled, "An act for securing the protestant religion and presbyterian church government," and every clause, matter, and thing in the said articles and act contained, shall be for ever ratified, approved, and confirmed.

And it is hereby further enacted by the authority aforesaid, that the act passed in this present session of parliament, entitled "An act for securing the church of England as by law established," and all and every the matters and things therein contained, and also the act of the parliament of Scotland, intituled "An act for securing the protestant religion and presbyterian church government," be, and shall for ever be held and adjudged to be, and observed as fundamental and essential conditions of the said union; and shall in all time coming be taken to be, and are hereby declared to be, essential and fundamental parts of the said articles and union: and the said articles of union so as aforesaid, ratified, approved, and confirmed by act of parliament of Scotland, and by this present act, and the said act passed in this present session of parliament, intituled "An act for securing the church of England as by law established," and also the said act passed in the parliament of Scotland, intituled "An act for securing the protestant religion and presbyterian church government," are hereby

enacted and ordained to be, and continue in all times coming, the complete and entire union of the two kingdoms of England and Scotland.

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Several of these acts have more clearly and emphatically asserted our liberties ; have regulated the succession of the crown by parliament, as the exigences of religious and civil freedom have required ; have pronounced the king's dispensing powers to be illegal ; have indulged tender consciences with every religious liberty, consistent with the safety of the state ; have established septennial elections of members to serve in parliament ; have excluded certain officers from the house of commons ; have restrained the king's pardon from obstructing the parliamentary impeachments of corrupt ministers ; have imparted to all the lords, the right of trying their fellow peers ; have regulated trials for high treason ; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten ; have, by the king's desire, set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament ; and have, by the like desire, made the judges completely independent of the king, his ministers, and his successors. Yet though these provisions have nominally and in appearance, conceded too much of the prerogative, and reduced the strength of the executive power to a much lower ebb than in any of the preceding periods ; if, on the other hand, we throw into the opposite scale, what the immoderate reduction of the ancient prerogative of the crown has rendered necessary, the vast acquisition of force arising from the riot act, and the indispensable expedience of a standing army ; and the vast acquisition of personal attachment, arising from the magnitude of the national debt ; and the manner of levying those millions which are annually appropriated to pay the interest, we shall find that the crown has gradually, and imperceptibly gained almost as much influence as it has apparently lost in prerogative.

It is impossible, within our limits, to enter into minute particulars, and therefore we can only notice alterations of moment in the administration of private justice during this period ; which are, the solemn recognition of the law of nations, with respect to the rights of ambassadors : for the amendment of the law, the cutting off by statute of a vast number of excrescences, that in process of time had sprung out of its practical part : the prostitution of corporate rights by the improvement in writs of *mandamus*, and informations in the nature of a *quo warranto* : the regulation of trials by jury, and admitting witnesses for prisoners on oath : the further restraints upon alienation of laws in mortmain : the annihilation of the terrible judgment of *peine fort et dure* : the extension of benefit of clergy, by abolishing the pedantic criterion of reading : the counterbalance to this mercy, by the vast increase of capital punishment : the new and effectual methods for the speedy recovery of rents : the improvements that have

been made in ejectments, for the trying of titles : the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shown the legal possibility and convenience of which our ancestors so long doubted, of assigning a *chose in action* : the translation of all legal proceedings into the English language : the erection of courts of conscience for recovering small debts, and the reformation of country courts : the great system of marine jurisprudence have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases : and lastly, the liberality of sentiment, which has now taken possession of our courts of common law, and induced them to adopt, wherever the facts can be clearly ascertained, the same principles of redress as have prevailed in the courts of equity, from the time that lord Nottingham presided there : and this, not only where specially empowered by particular statutes, (as in the case of bonds, mortgages, and set off,) but by extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by king Edward I., to almost every instance of injustice, not remedied by any other process.

In the reign of George III. the severe laws against the members of the church of Rome, were considerably softened, and some of them entirely repealed, and the full toleration of religious worship to every denomination of Christians was secured : the total abolition of the slave trade, characterise that prince's reign, as the era of practical liberality and freedom. In this reign, the act for the union of Great Britain and Ireland was passed on the 2d July, 1800, and is as follows :—

I. The united kingdom shall be represented by one parliament, styled “the parliament of the united kingdom of Great Britain and Ireland,” from and after 1st January, 1801; and the royal style and titles belonging to the imperial crown of such united kingdom and its dependencies, and the ensigns, armorial flags and banners thereof, shall be such as his majesty, by royal proclamation, under the great seal of the united kingdom, shall appoint.

II. The succession to the crown of the united kingdom, and the dominions thereunto belonging, shall continue, as settled by the existing laws, and the terms of union between England and Scotland.

III. The said united kingdom shall be represented in one and the same parliament, to be styled “the parliament of the united kingdom of Great Britain and Ireland.”

IV. Four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall be the number to sit and vote on the part of Ireland, in the house of lords; and one hundred commoners shall be the number to sit and vote on the part of Ireland, in the house of commons of the united kingdom.\* The lords of parliament, on the part of Ireland, shall have the same privileges as the lords on the part of Great Britain : and the lords spiritual of Ireland shall have rank next after the lords spiritual of the same rank of Great Britain, and shall enjoy the same privileges (except those depending upon sitting in the house of lords); and the temporal peers of Ireland, at the time of the union, shall have rank next after the peers of the like rank in Great Britain, and all peerages of Ireland, and of the united kingdom, created after the union, shall have rank according to creation : and all the peerages of Great Britain and of Ireland shall, in

\* For the present number of the Members, see the Reform Bill for Ireland.



all other respects, be considered as peerages of the united kingdom : and the peers of Ireland shall enjoy all privileges, except those depending upon sitting in the house of lords.

V. The churches of England and Ireland, as now by law established, shall be united into one protestant episcopal church, called the *united church of England and Ireland*, and the doctrine, worship, discipline, and government of which united church, shall remain in full force for ever, and be as now by law established ; for the church of England, and its continuance shall be deemed an essential and fundamental part of the union ; and in like manner, the doctrine, &c. of the church of Scotland, shall remain as now by law and by the acts of union established.

VI. His majesty's subjects of Great Britain and Ireland, shall, from the 1st January, 1801, be entitled to the same privileges, and be on the same footing, as to encouragements and bounties on the same articles, being the growth, produce, or manufacture of either country, and generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies ; and in all treaties made by his majesty with any foreign power, his subjects of Ireland shall have the same privileges, and be on the same footing as those of Great Britain.

After 1st January, 1801, all prohibitions and bounties on the export of articles, the produce or manufacture of either country to the other shall cease, and they shall henceforth be so exported without duties or bounties on export.

All articles, the produce or manufacture of either country, (with enumerated exceptions,) shall from thenceforth be imported into each country, from the other, free from duty, other than countervailing duties, or such as may be imposed hereafter by parliament ; and for twenty years from the union, certain enumerated articles shall be subject on import to duties.

Calicoes and muslins, shall on import from either country to the other, be liable to present duties till 5th January, 1808, when they shall be decreased in equal annual proportions, till they stand at 10 per cent., from 5th January, 1816, to 5th January, 1821 ; and cotton yarn and twist shall, on like import, be subject to present duties till January, 1808, after which, the latter shall be annually, in like manner, reduced, so that all duties may cease from January, 1816.

Articles, the growth, &c. of either country, which are subject to internal duty, or to duty on the materials of which they are composed, may be made subject, on import from each country to the other, to a reasonable countervailing duty, in respect of the above mentioned duty ; and on export, a drawback shall be given equal in amount to the countervailing duty which was paid on importation : and in like manner, the united parliament may impose any new or additional countervailing duties, or take off or diminish the existing ones, as may appear on the like principle, just, in respect of any additional internal duty, or of any abatement of duty ; and, when any such new duty is imposed on the above import, a drawback, equal to it in amount, shall be given in like manner, on the export of every such article, from one country to the other.

All articles, the growth, &c. of either country, when exported through the other, shall in all cases be exported subject to the same charges, as if exported directly from the country of which they were the growth.

All duty on import of foreign or colonial goods into either country shall, on export to the other, either be drawn back on the amount (if any is retained) placed to the credit of the country to which they shall be exported, so long as the expenditure of the united kingdom is defrayed by proportionable contributions ; but all existing duties, bounties, or prohibitions on corn, meal, malt, flour, or biscuit, may be regulated, varied, or repealed, as parliament shall deem expedient. \*

VII. The interest of the sinking fund, for the reduction of the debt of either kingdom, shall continue to be defrayed separately. For the space of twenty years after the union shall take place, the contribution of Great Britain and Ireland, respectively, towards the expenditure of the united kingdom, in each year, shall be defrayed in the proportion of fifteen parts for Great Britain, and two parts for Ireland : at the expiration of twenty years, the

future expenditure shall be defrayed in such proportions as the parliament of Great Britain shall deem just and equitable.

VIII. All laws in force at the union, and all courts of jurisdiction, within the respective kingdoms, shall remain subject to such alterations as may appear proper to the united parliament. All appeals shall be finally decided by the peers of the united kingdom. There shall remain in Ireland an instance court of admiralty, and appeals therefrom shall be to the delegates in chancery there: all laws contrary to the provisions enacted for carrying these articles into effect, are repealed.

The great seal of Ireland may, if his majesty think fit, be used in like manner after as before the union, except when it is otherwise provided by the above articles, within Ireland; and his majesty may, so long as he sees fit, continue the privy council of Ireland for that part of the united kingdom.

Since the passing of this act, accordingly, Ireland has stood in precisely the same situation as Scotland, forming an integral part of the dominions of the crown, and is represented in the parliament of the united kingdom: all acts, therefore, which have been passed since the 40 George III. of the Irish parliament, which are of a general nature, or on subjects which apply equally to the whole of the kingdom, are held, in practice, to extend to, and include Ireland, in cases even where Ireland is not expressly named, if the provisions are such as can be carried into execution in Ireland. But in cases where the subject does not apply to Ireland, or where an express exception is made in the act that it shall not extend to Ireland, or where, by the context of the act, and the limitation of the mode of recovering penalties, &c., to the courts of Great Britain or England only, it appears that Ireland was not in the contemplation of the legislature, such acts cannot, with propriety, be held to extend to Ireland; and these observations seem to apply, in an equal degree, to Scotland. In fact, it is to be lamented, that sufficient care is not always taken in the acts which are introduced into parliament, originally with a view to England only, either to extend their operation explicitly to Scotland or Ireland, where it may be expedient so to do; or, on the other hand, to except Scotland and Ireland where the general words of the act might be understood to extend to those parts of the united kingdom, although no such intention was really entertained by the framer of the act.

The political frenzy of the period induced the king's government to pass a bill through both houses of parliament, in order and for the immediate purpose of excluding Horne Tooke from the house of commons, and prospectively, all persons in holy orders; by which measure the clergy of the three established churches have no member to advocate their peculiar interests in the lower house. The members for the two universities of Cambridge and Oxford may be said to be their only representatives: it was attempted at the passing of the Reform Bill for Scotland, to give the Scottish universities one or more representatives, but, from the opposition the proposal met with, it was dropt. On the twenty-third of June, 1801, therefore, it was enacted, that, from that date, no person having been ordained to

the office of priest or deacon in England, or being a minister of the church of Scotland, is, or shall be capable of being elected to serve in parliament as a member of the house of commons; and if, in future, any person having been ordained to the office of priest or deacon, or being a minister of the church of Scotland, shall be elected, their election and return shall be void. And farther, if any member of the house of commons shall, after his election and return, be ordained to the office of a priest or deacon, or become a minister of the church of Scotland, then his seat shall immediately become void: and if any such person shall, in any of the aforesaid cases, presume to sit and vote as a member of the house of commons, he shall forfeit the sum of five hundred pounds for every day that he sits and votes: and any person who chooses to sue for the same in any of the courts in Westminster, may recover the penalty with full costs of suit. And every person against whom the penalties shall have been recovered, shall be from thenceforth incapable of taking, holding, or enjoying any benefice, living or promotion ecclesiastical, or any office of honour or profit under his majesty, or his heirs and successors. The prosecution, however, is limited to the space of twelve calendar months, beyond which no prosecution can lay against offenders. The act determines what shall be *prima facie* evidence of the ministerial character, by enacting, that the simple fact of the celebration of divine service according to the liturgy of the church of England, or in the extempore manner of worship of the Scottish establishment, in any church or chapel consecrated or set apart for public worship, shall be deemed and taken to be *prima facie* evidence of the fact of such person having been ordained to the office of a priest or deacon of the church of England, or of his being a minister of the church of Scotland within the intent and meaning of the act.\*

In 1805, an act was passed for more effectually carrying into effect the gracious act of queen Anne, for the augmentation of the maintenance of the poor clergy, by empowering the respective bishops of every diocese, and the guardians of spiritualities, *sede vacante*, from time to time as they shall see occasion, and as may best serve the purposes of the bounty to the poor clergy, to inform themselves of the clear improved yearly value of such benefices as were returned into the exchequer, to certify with all convenient speed to the governors of queen Anne's bounty for the augmentation and maintenance of the poor clergy; and the act authorises and empowers the said governors to act upon, and be guided by such new certificates of the value and other circumstances, as fully and effectually as they are, by the act of queen Anne, enabled to do with respect to such livings as were not certified into the exchequer. The act provides, that such certificates, so far as relates to first fruits and tenths, shall not be affected or altered in

\* 41 George III. c. 63.

any manner whatsoever. And in order to facilitate the intentions of all such persons as may be disposed to contribute to the augmentation of such livings and curacies as are within the meaning of the laws now in force respecting queen Anne's bounty, notwithstanding the statute of mortmain, it is declared to be lawful for any person having in his, her, or their own right, any money, goods, chattels, or other personal effects, to give, or grant, or vest, at their will and pleasure, in the governors of queen Anne's bounty, and their successors, to be by them disposed of according to law, all or any part of such money, goods, chattels, or other personal effects, without any deeds or enrolment.

In this long and glorious reign, members of the house of commons who were bankrupts, were declared ineligible to sit and vote in that house, it being thought necessary for preserving the dignity and independence of that honourable house, that members of the house of commons who become bankrupts and do not pay their debts in full, shall not retain their seats: that from the twenty-third day of July, 1812, whenever a commission of bankruptcy shall issue and be awarded against any member of the house of commons, and he shall be found and declared bankrupt under the same, such member shall remain twelve calendar months from the date of the commission utterly incapable of sitting and voting in the house of commons, unless the commission be superseded or the debts paid, of such creditors as prove on his estate within that period; provided, however, if the bankrupt should dispute any of the debts, and, within the aforesaid period, shall enter into bond for the disputed sums, with two sufficient securities to pay such sums of money as shall be recovered in any action, or suit in law or equity, this shall be considered as paid or satisfied, for the purposes of the act, so as to enable him to sit again. If the commission shall not be superseded within twelve months, nor the debts paid, then, immediately after the expiration of the twelve months, the major part of the commissioners shall certify the same to the speaker of the house of commons of the united kingdom, and the bankrupt's election is then to be declared void, and notice thereof inserted in the London gazette, and fourteen days afterwards, the speaker must issue his warrant to the clerk of the crown to make out a new writ for electing another member in the bankrupt's room.\*

The laws respecting dissenters were considerably altered; and several acts passed in the reign of Charles II., relating "to non-conformists and conventicles, and refusing to take oaths," were repealed, and other regulations adopted, which will be more particularly noticed under the head "Dissenters."† An act was also passed in this reign for better regulating and preserving parish and other registers of births, baptisms, marriages, and burials in England; for facilitating the proofs of pedigrees of

\* 52 George III. c. 144.

† 52 George III., 155.

persons claiming to be entitled to real or personal estates :\* this also will be noticed in another place, and need not, therefore, be here farther enlarged on. Appeals of murder, treason, felony, or other offences, with the senseless and brutal wager of battel, which originated in a barbarous age, and from a superstitious idea that the God of justice would grant victory to the innocent, although he might be the weakest, were entirely abolished in 1819 by an act of parliament. † Corruption of blood was taken away by this benevolent monarch, by an act passed, 1814, when it was enacted, that from July of that year, no attainder for felony, for the time to come, shall take place, save and except in cases of the crime of high treason, or of the crimes of petit treason, or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offenders, during their natural lives only ; and that it shall be lawful for any person, to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender, should, or might have appertained, as if no such offender had been, to enter into the same. ‡

The barbarous and cruel punishment for high treason was modified, and its cruelties removed in 1814, by an act of the legislature ; formerly, as the law stood, the sentence or judgment awarded against persons convicted of high treason, was, that they should be drawn on a hurdle to the place of execution, and there be hanged by the neck, but that they should be taken down before they were dead, and while still alive, their bowels were torn out and burned before their faces, and afterwards they were beheaded, their bodies divided into four quarters, and their heads and quarters being at the king's disposal, were stuck up in some public place of such towns as his majesty might direct : this latter part of the sentence had long fallen into disuse, the king always remitting it ; but the refinement of modern manners required that this relic of the olden time should be entirely expunged from the statute book : accordingly, it was enacted, that in all cases of high treason, the sentence or judgment, from and after the passing of this act, shall be, that the person guilty of treason, shall be drawn on a hurdle to the place of execution, and be there hanged by the neck, until such person *be dead* : and afterwards the head shall be severed from the body of such person, the body divided into four quarters, and to be disposed of as his majesty and his successors shall think fit. The statute further provides, that in case his majesty or his successors shall so think fit, he may by warrant, under his sign manual, countersigned by one of the principal secretaries of state, declare his will and pleasure, that such traitor shall not be drawn on a hurdle to the place of execution, nor hanged by the neck ; but that

\* 52 George III. 146. † 59 George III. c. 46. ‡ 54 George III. c. 145.

instead thereof, the head shall be there severed from the body whilst he is alive; and in such warrant, may direct and order how, and in what manner the body, head, and quarters shall be disposed of: and which it is the sheriff's duty to execute accordingly.\*

Besides improvements in the criminal law, this reign was signalized by the encouragement of learning and science, and the legislature secured the copies, and copy-right of printed books, to their authors and assigns, and repealed all former acts, which imposed a penalty, for not delivering copies of such works printed on the finest paper, to the stationers' company, for the various libraries which were intitled to receive them. In place of the old regulations, which made it imperative to deliver eleven copies, the act directs, that,

I. Eleven printed copies of the whole book, and of every volume thereof, upon the paper upon which the largest number or impression of such book shall be printed for sale, together with all maps and prints belonging thereto, which shall be printed and published, on demand thereof being made in writing to, or left at the place of abode of the publisher thereof, at any time within twelve months next after the publication thereof, under the hand of the warehouse-keeper of the company of Stationers, or the librarian, or other person thereto authorised by the persons, or body politic and corporate, proprietors or managers of the libraries following: viz., the British Museum, Sten College, the Bodleian library at Oxford, the public library at Cambridge, the library of the Faculty of Advocates at Edinburgh, the libraries of the four universities of Scotland, Trinity College library, and the King's Inns library at Dublin, or so many of such eleven copies, as shall be respectively demanded, on behalf of such libraries respectively, shall be delivered by the publishers thereof respectively, within one month after demand made thereof in writing, as aforesaid to the warehouse-keeper of the said company of Stationers, for the time being; which copies, the said warehouse-keeper is hereby required to receive, at the hall of the said company, for the use of the library for which such demand shall be made, within twelve months, as aforesaid: and the said warehouse-keeper, is hereby required, within one month after any such book or volume shall be so delivered to him, to deliver the same for the use of each library. And if any publisher, or the warehouse-keeper of the said company of Stationers, shall not observe the directions of this act therein, that then he and they, so making default in not delivering or receiving the said eleven copies as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds for each copy not so delivered or received, together with the full costs of suit, the same to be recovered by the persons, body politic or corporate, proprietors, or managers of the library, for the use whereof such copies ought to have been delivered or received: for which penalties and value, such parties are now hereby authorised to sue by action of debt or other proper action in any court of record in the united kingdom.

III. These libraries are not entitled to demand copies of a second or any subsequent edition of a book, unless such edition contains either alterations or additions; but additions printed in an uniform manner with the first edition, may be demanded.

IV. In order to afford further encouragement to literature, that from the passing of this act, the author of any printed work, or his assigns, shall have the sole liberty of printing and reprinting such books for the full term of twenty-eight years, to commence from the day of first publishing the same: and also, if the author be living at the end of that period, for the residue of his natural life. And if any bookseller, &c. in any part of the British dominions, shall, within the terms and times limited by this act, print, reprint, or import, without obtaining the consent of the author or proprietors of the copy-right in writing, or shall sell, publish, or expose for sale, any such book or books, without consent as aforesaid, they shall be liable to

\* 54 George III., c. 146.

a special action on the case, at the suit of the author or proprietors of the copy-right, in any court of record in that part of the British dominions where the offence shall have been committed, recover such damages as the jury on the trial shall give, or assess, together with double costs of suit; and all offenders shall also forfeit such book or books, and all and every sheet, being part of such book or books, and shall deliver the same to the author or his assigns, who are bound forthwith to reduce such books or sheets into waste paper.

V. The publisher of every book, demandable under this act, shall, within one calendar month after the day, in which any such book shall be first sold, published, or advertised for sale, within the bills of mortality, or within three months, in any other part of the united kingdom, enter the title to the copy of every such book, and the name and place of abode of the publisher, in the register book of the company of Stationers in London, as has been hitherto the custom, and deliver one copy on the best paper for the use of the British Museum. The Stationers' company are bound to keep such register at all times in their hall; and for every register they are entitled to the sum of two shillings, and no more. They are also obliged, at all reasonable and convenient times, to allow the said register to be inspected by any one, for which inspection the warehouse-keeper is entitled to a fee of one shilling, and a farther sum of one shilling, if he grants a certificate under his hand of the entry. In the case of magazines, reviews, or other periodical publications, it shall be sufficient to make entry in the company's register book within one month after the publication of the first number or volume.

VI. and VII. The warehouse-keeper of the Stationers' company is required, at an interval not exceeding three months, to transmit lists of such books as have been entered at the hall during each interval, to the librarians of the before mentioned establishments, and call on the publishers for the copies. But publishers may deliver to the different libraries such books as may be demanded of them, whose receipt shall be as effectual as if delivered at the company's hall.

VIII. IX. and X. The authors, or their assigns, of books that were already published before the passing of this act, were entitled to the benefit of an extension of the time from fourteen years, the former period of copy-right, to twenty-eight years, the present period; and authors living at the end of twenty-eight years, were entitled to have the sole right of publication during all the days of their natural life. The time of actions for recovery of damages was limited to twelve months after the commission of the offence, otherwise it is void, and of no effect. \*

Some new regulations were enacted respecting that most admirable institution, the Coroner's Inquest, in the election of coroners for counties; as the best institution, in the hands of fallible men, are liable through time to fall into disorder, and require improvement. The act accordingly directs, that

On any election of a coroner for any county in England and Wales, the sheriff shall hold his county court for such election, at the most usual place of elections of coroners, within such county, for the last forty years, and shall there proceed to election at the next county court, unless the same fall out to be held within six days after the receipt of the writ *de coronatore eligendo*, on the same day, and then shall adjourn the court to some convenient day, not exceeding fourteen days, giving ten days' notice of the time and place of election; and if the election is not determined, on the view, with consent of the freeholders there present, and if a poll is demanded, then the sheriff, or in his absence the under sheriff with his deputies, shall forthwith take the same in some public place, commencing on the day when demanded, and proceeding therein from day to day (except sunday), till finished, but not for more than ten days at most (except sunday), keeping the same open for seven hours a day, between nine o'clock A. M., and five o'clock P. M., and such sheriff, &c., shall appoint a convenient number of clerks for taking the poll in his presence, who, before they begin to take the poll, shall be sworn by the sheriff, truly and indifferently, to take the same, and to set down the names of each freeholder, and the place of his abode and freehold, and the name of his occupier, and for whom he shall poll; and to poll no freeholder who is not sworn, if so re-

\* 54 George III., c. 56.

quired by any candidate; the clerk shall take the poll in the presence of the sheriff, who shall appoint for each candidate a person nominated to him by the latter, to be inspector of the poll clerks, and every freeholder, before polling, shall, if required by any candidate, take the following oath, to be administered either by the sheriff, under sheriff, or sworn poll clerk:—  
 ' You swear (or, being a quaker, solemnly affirm) that you are a freeholder of the county of —, and have a freehold estate consisting of —, lying at —, within the said county, and that freehold estate has not been granted to you fraudulently, on purpose to qualify you to give your vote at this election, and that the place of your abode is at — (specifying street or place), that you are twenty-one years old as you believe, and that you have not been before polled at this election.'—And every freeholder and other person, taking such oath or affirmation, who shall thereby commit wilful perjury, and be convicted thereof, and any person who shall suborn any freeholder to take such oath, whereby he shall commit such perjury, shall be liable for their respective offences to the penalties as heretofore. No trustees or mortgagors are allowed any vote at such elections, in right of their trust or mortgage, unless they are in actual possession, or receipt of the rents or profits of the estate, but the mortgagor and *cestuique* trust in possession may vote for the same, notwithstanding any mortgage or trust; and all conveyances whatsoever, in order to multiply voices, or split the interest in any houses or lands among several persons, to enable them to vote at elections for a county coroner, are void. All the reasonable expenses incurred by the sheriff in providing poll books, booths, and clerks, for taking the poll at any such election, shall be paid by the candidates, in equal proportions, and the clerk shall not be paid more than one guinea per day.\*

In the year 1819, Sir Robert Peel brought in a bill, and which finally passed both houses, and received the royal assent on the 2nd July, for continuing the restrictions contained in several acts of parliament, on payments in cash by the bank of England, until the first day of May, 1823, and to provide for the gradual resumption of cash payments: and at the same time to permit the exportation of silver and gold.

I. That the several provisions of certain acts,† shall be further continued, until the 1st May, 1823: ‡ and that after that date, the restrictions on payments in cash, shall finally cease and determine.

II. That on, or after 1st February, 1820, and before the 1st October of the same year, whenever any person shall tender to the governor and company of the bank of England, any notes of the said bank, payable on demand, amounting to not less than the value of sixty ounces of gold, calculated after the rate of four pounds one shilling for every ounce of gold, and shall require standard gold for such notes, the governor and company of the bank of England shall, upon demand, pay to the tenderer of such notes, such quantity of gold, of the fineness declared to be the standard of the lawful gold coin of the realm, the same having been first assayed, and stamped at the mint in London, as shall be equal to amount of the notes, at the rate aforesaid, of four pounds one shilling per ounce.

III. Between the first day of October, 1820, and the first of May, 1821, such payments as above, shall be made in gold, of the standard fineness, calculated after the rate of three pounds nineteen shillings and sixpence per ounce, having been first stamped and assayed at his majesty's mint.

IV. Between the first of May, 1821, and the 1st May, 1823, such payments shall be made in gold, calculated after the rate of three pounds seventeen shillings and tenpence half-penny per ounce, stamped and assayed at the mint.

V. But between the first day of February, and the first day of October, 1820, the bank of England may make payments, at any rate less than four pounds one shilling, but not less than three pounds nineteen shillings and sixpence per ounce: and between the first day of October, 1820, and the first of May, 1821, the bank may pay at a less rate than three pounds

\* 56 George III. c. 95.

† 37 Geo. III. c. 45.—37 Geo. III. c. 91.

‡ Amended by 38 Geo. III. c. 1.—42 Geo. III. c. 16. also c. 23.



nineteen shillings and sixpence, but not less than three pounds seventeen shillings and tenpence half-penny, provided that the governor and company shall give three days' notice in the London Gazette, of their intention to make such payment after such rates, specifying the rates at which such payment shall be made.

VI. The governor and company of the Bank of England shall not be required or compelled to pay, or deliver any such gold, except in ingots or bars, of the weight of sixty ounces each, assayed and stamped as aforesaid.

VII. It shall, and may be lawful for the governor and company of the bank of England to pay any fraction less than forty shillings, of any sum so demanded, above the value of sixty ounces, in the lawful silver coin of the realm.

VIII. After the first day of May, 1822, the bank of England, if they shall think fit, may pay or exchange the lawful coin of the realm, for any of their own notes, payable on demand.

IX. From the passing of this act, till the first day of May, 1823, the governor and company of the bank of England shall deliver, weekly, a true and perfect account in writing, of the average amount of all promissory notes and bills of the said bank, which shall be in circulation during the week, to one of the clerks of his majesty's privy council; and, besides, they shall publish in the London Gazette, an account of the average number of promissory notes and bills quarterly, within one week, next after the end of each quarter respectively.

X. And as the laws in force against melting and exporting the gold and silver coin of the realm have been found to be ineffectual, and it is expedient that the traffic in gold and silver bullion should be unrestrained: this act renders it lawful for any person to export gold or silver coin beyond seas, to melt the same, and to manufacture, or export, or otherwise dispose of it, without any restriction, forfeiture, pain, penalty, incapacity, or disability whatever.

XI. To remove all doubts respecting ancient statutes against melting and exporting gold or silver coin, this clause repeals them all, except only so far as relates to any suit, action, or information, which might have been pending at the passing of this act. \*

XII. Repeals several acts against clipping and counterfeiting the coin of the kingdom, and the statute requiring the oath of the exporter, that no part of the molten gold or silver was part of the coin of the realm, and some others, or the captain, that he did not knowingly receive such molten coin on board his vessel for exportation.

XIII. Provided always, that nothing in this act contained, shall either extend, or be construed to extend, to repeal, or alter, any acts, or parts of any acts in force in Great Britain and Ireland, so far as the same relates to the prevention, detection, or punishment of clipping, washing, rounding, filing, impairing, diminishing, falsifying, scaling, or lightening of the lawful coin of the realm; or to the inflicting any pain, penalty, or forfeiture on any persons guilty of such offences, or guilty of buying or selling, or knowingly having in their custody, any clippings or filings of such coin; and that from, and after the passing of this act, before any persons shall transport, or cause to be transported, any molten silver whatever, oath shall be made before the wardens of the company of Goldsmiths in London, or one of them, by the owner of such molten silver, and likewise by one credible witness, that the same is lawful silver, and that no part thereof was, before the same was molten, clippings of the current coin of this realm, which oath one or more of the said wardens are bound to administer, instead of the former oath; and that after the passing of this act, before any persons shall ship, or cause to be shipped, any molten silver, or bullion, oath shall be made before the court of the lord mayor, and aldermen of London, by the owner of such molten bullion, and by two or more credible witnesses, that no part of such molten bullion was, before melting, clippings of the coin of this realm: and all the powers, authorities, rules, regulations, and provisions in former acts, shall continue in force, with relation to the clipping of the coin of the realm, and with relation to the exportation of any molten silver, or bullion whatsoever, which, before the melting thereof, was clippings of the coin of the realm, and in all other respects whatever, except only so far as the same is expressly repealed or altered by this act. †

\* 9 Ed. III.—17 Ed. III. c. 1.—27 Ed. III. c. 14.—38 Ed. III. c. 2.—5 Rich. II. c. 2.—17 Rich. II. c. 1.—2 Hen. IV. c. 5.—2 Hen. VI. c. 6.—4 Hen. VII. c. 23.—13 & 14 Car. II. c. 31.—6 & 7 W. & M. c. 17.—7 & 8 W. & M. c. 19.

† 50 Geo. III. c. 40.

Many people have been of opinion, that this act has not been beneficial to the trade and commerce of the kingdom ; and the attempt to extend its operation to Scotland, was resisted with unexampled unanimity ;—petitions poured in from every town and village in the kingdom, and the late Sir Walter Scott, wrote violent philippics against the measure under the fictitious name of Malachi Malagrowth ; and parliament, yielding to the expressed wishes of the people of Scotland of all shades of politics and religion, confined the operation of the bill to the realm of England. On the same day, 2nd July, 1819, the royal assent was given to a bill to amend the laws respecting the settlement of the poor, so far at least as regards renting of tenements, on account of the disputes and controversies which daily occurred respecting the settlement of the poor, and the renting of tenements. It was in consequence enacted, that no person shall acquire a settlement in any parish or township in England, maintaining its own poor, by reason of their dwelling and renting for forty days in any tenement, unless it shall consist of a house or building within such parish or township, or of both, *bona fide*, hired by such person at, and for the sum of ten pounds a year at the least, for the term of one whole year ; nor unless such house or building shall be held, and such land occupied, and rent for the same actually paid for the term of one whole year at the least, by the person hiring the same ; nor unless the whole of such land shall be situate within the same parish or township, as the house wherein the person hiring such land shall dwell and inhabit.

On the 29th July, 1812, an act was passed, which shall be more particularly mentioned hereafter, under our historical account of the Dissenters, to repeal certain acts and amend others, relating to religious worship and assemblies, and persons teaching and preaching therein. There is an express proviso in the act, for the ecclesiastical jurisdiction of the church of England, providing, that the act shall neither be construed in any way, to affect the celebration of divine service according to its rites and ceremonies, by its own ministers, and in its own places of worship, nor the jurisdiction of the archbishops and bishops, or other persons exercising lawful authority in the established church of England and Ireland. But it expressly enacts, that nothing in the act shall extend, or be construed to extend to the people usually called Quakers, or to their religious assemblies.\*

Disturbances,—arising out of political differences of sentiment, and the public and private distresses, owing to the violent and extensive changes which had taken place subsequent to the battle of Waterloo, and the restoration of the French monarchy,—were frequent in various manufacturing districts, and led to many breaches of the peace, and in more than one instance, to meetings in arms for the overthrow of the government, and

\* 52 Geo. III., c. 155.

to the secret drilling or training to arms, in the manufacturing districts. In consequence of these unlawful transactions, parliament passed an act in the last year of the reign of George III., for the suppression and prevention of such meetings, on the 11th December, 1819 :—

I. Whereas, in some parts of the united kingdom, men, clandestinely and unlawfully assembled, have practised military training and exercise, to the great terror and alarm of his majesty's peaceable and loyal subjects, and the imminent danger of the public peace: be it therefore enacted, that all meetings and assemblies of persons, for the purpose of training or drilling, or of being trained or drilled, to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his majesty, &c. for so doing, are hereby prohibited, as dangerous to the peace and security of his majesty's liege subjects and his government; and any person who shall be present, or attend such meetings or assemblies, for the practice of military exercise, movements, or evolutions, or who shall train any other person to the use of arms, or who shall aid or assist them therein, on legal conviction, shall be liable to transportation for any term not exceeding seven years, or to imprisonment, not exceeding two years, at the discretion of the court.

II. Any justice of the peace, or any constable or peace officer, or any other person acting in their aid or assistance, may disperse such unlawful meeting or assembly, and arrest and detain any person present at, or aiding or assisting or abetting such meeting or assembly. And the justice of peace before whom such offender shall be brought, shall commit him to prison for trial, unless sufficient bail be given for his appearance at the next assizes, or general or quarter sessions of the peace, to answer to any indictment that may be preferred against him in England and Ireland: and in Scotland, every such person shall be arrested and dealt with according to the law and practice of that part of the united kingdom, as in the case of a bailable offence.

III. The sheriffs depute and their substitutes, stewards depute and their substitutes, justices of the peace, magistrates of royal burghs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers, of any county, stewartry, city, or town, within that part of the united kingdom called Scotland, shall have such and the same powers and authorities for putting this present act in execution, within Scotland, as justices of the peace, and other magistrates, peace officers, and constables, respectively, have by virtue of this act, within other parts of the united kingdom.

IV. Offenders may be prosecuted by indictment, or otherwise, for any offence within the intent and meaning of this act, as if it had never been passed, if previously indicted.

V. Any action or suit brought or commenced against any justice of the peace, constable, peace officer, or other persons in England or Ireland, for any thing done or acted in pursuance of this act, must be commenced within six calendar months next, after the fact committed, and not afterwards; and the venue in every such action or suit, must be laid in the proper county, where the fact was committed, and not elsewhere; and in every such suit the defendants may plead the general issue, and produce this act, and the special matter, in evidence at any trial: and if such action or suit shall be commenced after the limited time, or the venue be laid in other place than as aforesaid, then the jury shall find a verdict for the defendants: and in such case, or if the jury find a verdict for the defendants upon the merits, or if the plaintiff is nonsuited or discontinue his action after appearance, or if upon demurrer, judgment shall be given against the plaintiff, the defendant shall have double costs, which they may recover in the same manner, as any defendant can by law in other cases.

VI. Every action or suit which shall be brought against any person in Scotland, for any thing done or acted in pursuance of this act, shall also be commenced within six months after the commission of the fact, and not afterwards, and shall be commenced in the court of session: and here also the defendants may plead the authority of this act, and produce it in evidence: and any suit commenced in the court of session after the limited time, shall be dismissed; and if the defendants shall be assolized, or the pursuer shall suffer the action to fall asleep, or if a decision is pronounced against the pursuer upon the relevancy, the defend-

ants shall have triple costs, or expenses, which he may recover in the same way as in other cases.

VII. The act provides, that no person shall be prosecuted by virtue of this act, for any thing committed contrary to its provisions, unless such prosecution shall be commenced within six calendar months after the commission of the offence.\*

Much about the same time, also, an act was passed, authorizing justices of the peace, in the disturbed counties in Great Britain, to seize and detain arms, when collected and kept for purposes dangerous to the public peace: but as this act was only intended for a temporary purpose, and expired on the 25th March, 1822, it is not necessary to detail its provisions.

After a reign of sixty years, George III. was gathered to his fathers, "and his son reigned in his stead." During the reign of George III. much was done for the amelioration of the laws, affecting all classes of his majesty's subjects, both in a political and religious point of view; but in the reign of his successor, George IV., the most fundamental legal changes were effected, in decided improvement of the laws, and in some of the barbarous customs, which being introduced in times of ignorance and superstition, had become obsolete in practice, although they still continued to hold their place in the statute book. The long and profound peace which succeeded the conclusion of the war with the emperor Napoleon, gave time and leisure for the examination and improvement of the statute laws of the kingdom, and for the introduction of some fundamental changes, the propriety and utility of which, men in this happy region of freedom and unshackled thought, may be permitted to doubt.

We therefore propose to enumerate the statutes referred to, in their order, giving the more important ones at full length.

In the first year of this sovereign's reign, an act was passed to prevent delay in the administration of justice, in cases of misdemeanor, on the 23d December, 1819, which was rendered necessary, because formerly, defendants prosecuted in the courts of king's bench, in Westminster, and Dublin, and in the sessions of the peace, and of Oyer and Terminer, great sessions, and of gaol delivery in England and Ireland, had an opportunity of postponing their trials to a distant period, by means of imparlances in these several courts, and the time allowed them in consequence. By this act, therefore, the defendant is prohibited from impugning to another term, but is required to plead or demur, within four days from the time of appearance; and in default of such pleading or demurring, within four days, judgment may be entered against the defendant for want of a plea.† An act was passed, for more effectually preventing seditious meetings and assemblies, on the 24th December, 1819, on account of the assembling of large concourses of people, in various parts of the kingdom, under pretext of deliberating on public grievances, and of agreeing on petitions, complaints, remonstrances, declarations, resolutions, or addresses, in a manner, manifestly tending to produce confusion and calamities in the nation: it was therefore enacted, that not more than fifty persons, except in the case of county meetings lawfully convened, shall be permitted to meet, unless in separate parishes, or townships, and where persons calling the meeting, usually inhabit, and with notice to a justice of the peace, previously given by seven house-

\* 60 Geo. III. & 1 Geo. IV., c. 1.

† 1 Geo. IV., c. 4.

holders, subscribed with their names, places of abode, and designations, under a penalty of fine and imprisonment, not exceeding twelve calendar months, at the discretion of the court. And if persons attending such meetings, refuse to depart after proclamation made, they shall upon conviction be guilty of felony, and liable to transportation for seven years. Justices of the peace, are to make proclamation in a loud voice, commanding the meeting to disperse: "Our sovereign lord the king, chargeth, and commandeth all persons here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or their lawful business: GOD SAVE THE KING." And if after such proclamation twelve men remain together, and refuse to disperse by the space of half an hour, they shall be guilty of felony and liable to transportation for seven years.

On account of the increase of blasphemous and seditious libels, an act was passed on the 30th of December, 1819,\* for their more effectual punishment: In any case in which verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous or seditious libel tending to bring into hatred or contempt his majesty's or his regent's persons, or the government and constitution of the united kingdom, or either house of parliament; or to excite his majesty's subjects to attempt the alteration of any matter in church or state, otherwise than by lawful means. It shall be lawful to seize and carry off all the copies of such libel whosesoever possession they may be in; and in case of refusal to admit the officers, they may enter by force; and, in the event of a second offence, the offender may be transported for any length of time that the court shall appoint.† In connexion with this, an act was at the same time passed for regulating the newspaper stamps, and for restraining the abuses arising from the publication of blasphemous and seditious libels.‡

In the beginning of the reign of George IV., as is usually and annually done, an act was passed for punishing mutiny and desertion in the army; and, as the articles of war are not generally known, we shall here transcribe it.

If any person who is or shall be commissioned, or in pay as an officer, or listed as a non-commissioned officer or soldier, shall at any time begin, excite, cause, or join in any mutiny or sedition in his majesty's land or sea forces, or shall not use his utmost endeavours to suppress the same, or without delay give notice thereof to his commanding officer; or shall misbehave himself before the enemy; or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge; or shall compel the governor or commanding officer of any such to deliver it up to the enemy or to abandon the same; or shall induce others to misbehave before the enemy, &c.; or shall leave his post before he is relieved, or shall be found sleeping on his post; or shall hold correspondence with, or give advice or intelligence to any rebel or enemy, either by letters, messages, signs, or tokens in any manner or way whatsoever; or shall treat or enter into any terms with such rebel or enemy without his majesty's license, or the general or commander-in-chief's license; or shall strike, or use any violence against his superior officer, being in the execution of his office; or shall disobey any lawful command of his superior officer,—every person so offending in any of the above mentioned matters, whether within or without the realm, on land or sea, shall *suffer death*, or such other punishment as a court martial shall inflict.

In all trials by courts martial, every member, before any proceedings be had, shall take the following oaths upon the holy evangelists, before the judge advocate or his deputy:

"You shall well and truly try and determine according to your evidence in the matter now before you. So help you God."

"I, ———, do swear that I will duly administer justice according to the rules and articles for the better government of his majesty's forces, and according to an act of parliament now in force for the punishment of mutiny and desertion, and other crimes therein mentioned,—without partiality, favour, or affection: and if any doubt shall arise, which is not explained by the said articles or act of parliament, according to my conscience, the best of my understanding, and the custom of war in the like cases: and I further swear, that I will not divulge the sentence of the court until it shall be approved by his majesty, or by some person duly authorized by him; neither will I, upon any account, at any time whatsoever,

\* 60 Geo. III. & 1 Geo. IV., c. 6. † 60 Geo. III. & 1 Geo. IV., c. 8. ‡ Ibid. c. 9.

disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness, by a court of justice or a court martial, in a due course of law. So help me God."

And so soon as the said oaths shall have been administered to the respective members, the president of the court is hereby authorized and required to administer to the judge advocate, or the person officiating as such, an oath in the following words:

"I, \_\_\_\_\_, do swear that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness, by a court of justice or a court martial, in a due course of law. So help me God."

And no sentence of death shall be given against any offender in such case, by any general court martial, unless nine officers present shall concur therein: except such general court martial shall be holden in any place beyond the seas out of his majesty's dominions, or out of any of the settlements belonging to the united company of merchants of England trading to the East Indies, or in his majesty's colony of the Bermuda Isles, or in Africa, or in New South Wales: and in all cases when a court martial shall consist of more officers than thirteen, and also in any of the aforesaid places and settlements, when the same shall consist of a lesser number of officers, then such judgment shall pass by the concurrence of two thirds at least of the officers present; and no proceeding or trial shall be had upon any offence but between the hours of eight of the clock in the morning and four in the afternoon, except in cases which require an immediate example. All witnesses duly summoned by the judge advocate, or his deputy, during their necessary attendance in such courts, both in going to and returning from the same, shall be privileged from arrest, in the same manner as witnesses attending any of his majesty's courts of law; and if any such witness shall be unduly arrested, the court out of which the process issued, shall discharge such arrest; or if that court is not sitting, then the judge of the king's bench in London, or Dublin, or court of session in Scotland, or the courts of law in the East or West Indies, or elsewhere, shall discharge the arrest. And all witnesses, duly summoned, who refuse or neglect to attend on courts martial, shall be liable to attachment in the court of king's bench in London, or Dublin, or court of session, sheriffs, or stewards depute, or their substitutes, within their several shires or stewardries in Scotland, or the courts of law beyond the seas.

XXXIII. Every judge advocate or his deputy is required to transmit, with as much expedition as the opportunity of time and place will permit, the original proceedings and sentence of such court martial, to the judge advocate general in London; in whose office they are to be carefully kept and preserved, that copies may be obtained by persons having a right thereto.

XLIX. Constables, and other chief officers in Ireland, shall quarter and billet the officers and soldiers in inns, &c., taking care not to billet less than two men in any one house. And if any constable, &c., shall presume to quarter or billet any officer or soldier in any house not within the meaning of this act, without the consent of its owner or occupier, such owner or occupier shall have his remedy at law. Any military officer using threats or menaces to induce any constable to act in contravention of this act, on conviction, shall be deemed and taken to be *ipso facto* cashiered, and utterly disabled to have or hold any military employment whatsoever.

LXVII. Officers receiving pay or subsistence money, either for a whole regiment or particular troops or companies, shall settle every four days, or before the troops quit their quarters, the just demands of all persons keeping inns, or other places where soldiers are quartered; and if any officer shall not satisfy, content, and pay the same, on complaint and oath made by two witnesses at the next quarter sessions, the secretary at war in England, or the secretary in Ireland, are required and authorized to give orders to the agent of the troop or company, to pay and satisfy the said sums, and to charge the same against such officer.

The next two sections provides for the ordinary and extraordinary providing of carriages for the forces marching in England and Ireland. In cases of emergency, justices may be required to issue warrants for providing saddle horses and four wheel carriages let to hire, and also vessels; and officers demanding them, are to pay for their hire such sums as the justices shall direct. The constable shall give a receipt without a stamp, and order the horses,

&c. to be provided; and military officers may convey on these, arms, clothes, accoutrements, baggage, equipage, officers, soldiers, servants, women, children, and other persons. There is also a clause for the relief of such men as too hastily enlist themselves; they shall be at liberty to declare their dissent to such enlisting before a magistrate within four days, but not sooner than twenty-four hours.\*

An act was passed on the 15th July, 1820, repealing the public and private whipping of women, and, instead of that relic of barbarism, was substituted for female offenders, imprisonment or solitary confinement.† And, at the same time, an act for the better administration of justice in the court of exchequer chamber in Ireland.‡ On the 24th July, 1820, was passed the act which reduced the duties on distillation in Scotland, and for the better prevention of private distillation; and which it is to be feared has greatly increased the amount of public and private crime, by encouraging intemperance and idleness.§

On the 7th May, 1831, an act received the royal assent for making further provision for the gradual resumption of payments in cash by the bank of England, by an extension of the act already recited, page 275, for the payment of notes in gold bars or ingots, authorizing the bank of England to pay their own notes, or any other debt, on demand, in the current and lawful coin of the realm.§ The bearers of such notes are not entitled to demand ingots or bars of gold. But persons not offered to be paid in coin, are not deprived of their right to demand ingots. This act also repeals that part of the former relating to the exportation of molten gold. The bank of England have an option, when their notes are offered for exchange, of paying either in one pound notes or in coin, as they shall think fit. A similar act was also extended to Ireland.¶

On the 7th May, the African company wholly ceased and determined, and no longer continued to be a body corporate or politic; and, by act of parliament, all grants made to them were declared void, and they were divested of all forts, castles, buildings, possessions, or estates which they formerly held on the gold coast of Africa, and the same shall henceforth be fully and absolutely vested in his majesty, his heirs, and successors for ever.\*\*

The better regulation of the attendance of jurors at the assizes was enacted on the 8th June, 1821. That from henceforth in any county in England and Wales, and the counties palatine of Chester, Durham, or Lancaster, the sheriff or other officer to whom belongs the return of the *venire facias juratores*, shall summon and impanel not more than one hundred and forty-four jurors, or such lesser number as the judge shall think fit to direct, to serve indiscriminately on the civil and criminal side; which jurors shall be divided equally into sets, the first set shall attend and serve for so many days at the beginning of each assize, and the second set shall attend and serve for the residue of the assize. The summons for the attendance must be endorsed on the back for which set the juror is summoned.†† The proceedings in the civil side of the court of king's bench, and also in the court of common pleas, and in the pleas or common law side of the court of exchequer in Ireland, were newly regulated by act of parliament, 15th June, 1821:‡‡ and, at the same time, the office of clerk of assize, or *nisi prius*, or judges registrar in Ireland, were also regulated. It was enacted, on the 10th July, 1821, that from that date any person rescuing, or aiding and assisting in rescuing, persons charged with felony, shall be themselves guilty of felony, and liable to imprisonment for any term not less than one year, and not exceeding three years, or to be transported for seven years, at the discretion of the court. Assaulting, beating, or wounding any constable, &c. in order to obstruct or prevent apprehension, they shall be kept to hard labour for any term not exceeding two years, and not less than six months.§§

An act, to amend certain provisions of a previous act, §§ for preventing clandestine marriages, was passed on the 22nd July, 1822, and caused considerable confusion and discussion. All that part of the statute of George II., which related to any subsequent marriage, was repealed; but all marriages, solemnized by license before this date, if not otherwise invalid, were recognised as good and valid to all intents and purposes; but this act did not render any marriage valid, which had been declared by competent authority to be invalid. It was declared that this act should not affect or prejudice the right and interest which any person may

\* 1 Geo. IV., c. 12. † 1 Geo. IV., c. 57. ‡ Ibid., c. 66. § Ibid., c. 74. ¶ 50 Geo. III., c. 48.  
 ¶ 1 & 2 Geo. IV., c. 26. \*\* 1 & 2 Geo. IV., c. 28. †† 1 & 2 Geo. IV., c. 46. ‡‡ 1 & 2 Geo. IV., c. 52.  
 §§ 1 & 2 Geo. IV., c. 88. §§ 26 Geo. II., c. 32.

have in titles of honour or of property, on the ground of former invalidity. The eighth section provides, that no license for any marriage, after the 1st September, 1822, shall be granted by any person having authority to grant licenses, until the parties make oath, that they are respectively, or that each of them believes the other to be of the full age of twenty-one years or upwards; and if both parties are under the age of twenty-one years, whether they are either a widower or widow respectively, then each shall make oath accordingly, both as respects themselves, and of their belief respecting the opposite party; and both parties are to make oath, that the consent of parents, or guardians, have been signified. And if either or both of the parties, shall be twenty-one years of age, the license shall not be granted, until the parties shall have produced extracts from the registers of their baptism, if such register be in England, and can be found: which extracts must be proved to be correct, by the oath of some other party. But if the register cannot be found, still the license cannot be granted, unless the fact shall be proved to the satisfaction of the party granting the license, by some other person making oath, that he believes the parties to be of full age, and stating the grounds of his belief. To all which the consent of guardians in writing, attested by two witnesses was required, whose oath was also farther necessary to prove the handwriting, and the right of the parent, or guardian, to give such consent. The fourteenth section authorized the archbishops of Canterbury and York, and the several other bishops, within their respective dioceses, only to grant licenses. One of the parties must be resident within the diocese of the bishop who grants the license, proved and certified by all the oaths and formalities, as before mentioned. \* This clause was repealed the following year, on the 7th March, 1833; and all marriages, solemnized in consequence of a license, granted subsequent to the passing of the *aforesaid* act, by any body corporate, or person, or their surrogate, contrary to the meaning of the *aforesaid* act, were held and declared to be valid; and the parties irregularly granting the licenses, were relieved from pains and penalties. Before the publication of banns, it was required by the act, that the parties made affidavits in writing, of their names, ages, and places of residence, and delivered these to the minister, under a heavy penalty; and besides, before the banns could be published, to affix the names and surnames, and places of residence of the parties, with all the particulars already specified, on the church doors, to remain until the three sundays of publishing the banns were expired. The church-wardens were obliged to preserve the affidavits in a chest, to be provided for the purpose; false names, however, did not void or invalidate the marriage; the act farther required, where no license was granted, that banns should be published on three several Sundays † This absurd act created (as may easily be supposed from some of its provisions,) the utmost confusion and inconvenience, and its tendency was much more likely to encourage illegitimate intercourse, and contempt for the holy estate of matrimony, than to induce the youth of either sex to enter into those sacred vows that bind society together, and man to leave father and mother, and cleave unto his wife, agreeably to the divine institution, in the state of man's innocency in paradise.

The inconvenience of the preceding act was so great, that the whole kingdom of England (to which only it was confined) made an unanimous call on the legislature for its repeal, and accordingly on the 26th March, 1823, in addition to the 14th section already noticed, as repealed, ‡ the 8th and 26th, were by this act totally repealed, and licenses were permitted to be granted by the same persons, and in the same manner as formerly, in the case of minors, with the same consent, and banns to be published as heretofore; without any of the unpleasant machinery of oaths, and fixing on the church doors, as were enacted the previous year. A farther amendment was found necessary, to be made on the 18th July, 1823, and 17th May, 1824, which greatly improved the act which caused so much confusion. ||

This year, on the 17th June, an act was passed to enlarge the powers of justices of the peace, in hearing and determining complaints, between masters and servants, and between masters, apprentices, artificers, and others; which authorized any master or mistress, their stewards, managers, or agents, to complain against any apprentice on oath, to any justice of the peace of the county or place for any misdemeanor, misconduct, or ill behaviour

\* 4 Geo. IV. c. 5.

+ 3 Geo. IV., c. 75.

‡ 4 Geo. IV., c. 5.

§ 4 Geo. IV., c. 17.—4 Geo. IV., c. 76.—5 Geo. IV., c. 32.



on the part of his apprentice; or if he absconds, the justice of the peace is empowered, upon complaint on oath, being made to him, to issue a warrant for his apprehension: and, the said justice can hear and determine the same complaint, and punish the offender, by abating the whole, or any part of his, or her wages, or by commitment to the house of correction, to be held to hard labour for a reasonable time, not exceeding three months. \*

On the 27th June, 1823, a new act was passed for the registry of vessels, wherein a number of preceding acts were repealed, and their provisions were consolidated into one act; and it was declared, that no ship or vessel having a deck, or being of the burden of fifteen tons or upwards, shall be entitled to any of the advantages or privileges of a British ship, until the persons claiming property in her, shall have caused the same to be registered, and have obtained a certificate of the registry, from the persons empowered to give it; and in case such vessel, shall exercise any of the privileges of a British ship, the same shall be subject to forfeiture. This act was again partially repealed, and the same, and some other provisions enacted by a subsequent act. †

The laws respecting the interment of persons committing suicide, were partially altered: formerly a *felo de se*, or self murderer, was buried in a cross road, with a stake driven through his body; but now by this act, the coroner is empowered to direct his remains to be privately interred in the church yard, and, without any stake driven through his body. But the act prohibits the performance of all Christian rites, that is, the solemn burial service to be said at such funerals. ‡

The sum of £50,000, was voted by the commons, on the 18th July, 1823, for building additional places of worship in the Highlands and Islands of Scotland, because, in various parts of the country, the parishes are so extensive, that it was found impossible for many of the inhabitants to attend divine service at the parish church, or for the minister to visit the more distant parts. §

A bill passed both houses of parliament, and received the royal sanction, on the 17th June, 1824, for ascertaining, establishing, and regulating uniformity in the weights and measures, and which came into operation all over the three kingdoms, on the 1st May, 1826. The distance between the centres of the two points in the gold studs, in the straight brass rod, kept by the clerk of the house of commons, when at the temperature of 62 degrees, by Fahrenheit's thermometer, is declared to be the genuine standard of the imperial yard measure, and the only standard measure of extension whatsoever, by which measures, whether lineal, superficial or solid, shall be derived, computed, and ascertained. One third part of the said brass rod, to be a foot, the twelfth part of such foot an inch; the pole or perch, shall contain five such yards and a half in length; the furlong, two hundred and twenty; and the mile, one thousand seven hundred and sixty such yards. All superficial measure, shall be computed and ascertained by the same standard yard, or by certain parts, multiples, or proportions thereof: the rood of land, shall contain one thousand two hundred and ten square yards, of the imperial standard: an acre of land, shall contain four thousand eight hundred and forty such square yards. The standard brass weight of one pound Troy weight, made in the year 1758, now in the custody of the clerk of the house of commons, is defined to be the standard measure of weight. The standard measure of capacity, both for liquids and for dry goods, that are not measured by a heaped measure, shall be the gallon, containing ten pounds of avoirdupois weight of distilled water, weighed in air, at the temperature of 62 degrees, of Fahrenheit's thermometer, the barometer being at 30 inches, and which is declared to be the unit, and only standard measure of capacity, by which wine, beer, ale, spirits, and all sorts of liquids and dry goods, not measured by heaped measure, shall be derived, computed, and ascertained; of which the quart shall be one fourth, the pint one eighth; two such gallons shall be a peck, and eight such gallons shall be a bushel, and eight such bushels shall be a quarter of corn, or other dry goods, not measured by heaped measure; coals, culm, lime, fish, potatoes, or fruit, and all other things sold by heaped measure, shall be measured by the aforesaid bushel, containing eighty-four pounds avoirdupois, as before, the same being made round, with a plain and even bottom, and nineteen inches and a half, from outside to outside. In heaped measure, the heap to be in the shape of a cone, of the

4 Geo. IV., c. 34.  
‡ 4 Geo. IV., c. 52.

† 4 Geo. IV., c. 41.—6 Geo. IV., c. 110.  
§ 4 Geo. IV., c. 79.

height of at least six inches; three such bushels shall be a sack, and twelve such sacks, a chaldron of coals.\*

Mr Joseph Hume introduced a bill into parliament for the repeal of all the laws relative to the combination of workmen, and which finally passed on the 21st June, 1824. This act repealed some acts partially and others entirely, from 39 Edward I. to the 57 George III.; together with all other laws, statutes, and enactments now in force throughout any part of the united kingdom relative to combination, to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to regulate or control the mode of carrying on any manufacture, trade, or business, or its management; relative to combinations, to lower the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate or control the mode of carrying on any manufacture, &c.; relative also to fixing the amount of the wages of labour, or to oblige workmen, not hired, to enter into work: together with any other enactment, enforcing or extending the application of any of the *afore*said acts or enactments, are by this act repealed. This act exempts workmen from punishment under the statute law who enter into combinations; and masters offending, in like manner, are also protected from prosecution.† At the same time an act was passed consolidating and amending the laws relative to the arbitration of disputes betwixt workmen and their masters;‡ and also to repeal the laws previously in force for prohibiting artificers from going abroad, so that an artisan is now free to carry his industry to any part of the globe where he chooses.‡

Parliament were not inattentive to the gradual increase of public opinion on the traffic in slaves, between the great slave mart, Africa, and our West Indian colonies; and accordingly an act passed both houses, and received the royal assent on 24th June, 1824, repealing all acts relating to the slave trade, and the exportation and importation of slaves into any of our colonies: the purchase, sale, or contract for slaves was declared to be illegal, making loans or guarantees—the shipping of goods for their purchase, and the serving on board vessels for any such purpose, or insuring vessels or slaves, were declared to be unlawful, and under a penalty of £100 for each slave. Dealing in slaves on the high seas to be deemed piracy, and the penalty of death awarded on conviction. Nothing, however, in this act interferes with the owners of slaves already domesticated in our colonies, who may be employed on the high seas, or any where else at their masters' option. This act embodies the treaty between Great Britain and Portugal, signed at Vienna, 22d January, 1815, for the suppression of the slave trade, by the Portuguese to the north of the equator, signed by the late lord Castlereagh and the viscount Palmella; a treaty with the court of Spain, signed at Madrid, 23d September, 1817; also a treaty with the king of the Netherlands, for preventing their subjects engaging in any traffic in slaves, signed at the Hague, 4th May, 1818; besides additional articles, notes, and instructions entered into with all these powers. The act allows a bounty of £10 for every man, woman, and child slave found on board any captured slave ship after condemnation, to be paid out of the consolidated fund.‡

On the 10th June, 1825, an act passed through parliament to enable the lords of the treasury to purchase from John, duke of Athole, the right of sovereignty, which that nobleman held as heir of the seventh earl of Derby, who was king of Man, and to annex the same to the imperial crown for ever.§ The law of Scotland regarding leasing-making, sedition and blasphemy, which were subject to a very severe penalty, has been assimilated to the law of England; and, therefore, for the first offence, under any of these heads, the offender is liable to fine or imprisonment at the discretion of the court; for the second, both fine and imprisonment, or to be banished from the king's dominions, at discretion; and if the offender who has been sentenced to banish himself out of the king's dominions, shall be found at large forty days afterwards, he may then be transported for fourteen years.\*\*

An act was passed this year for the more easy recovery of small debts in Scotland, empowering justices of the peace to hear and determine causes and complaints under five pounds. The act enjoins that a copy of the complaint, warrant, citation, and amount of debt shall be delivered at same time to the defender *personally*, or left at his dwelling place;

\* 5 Geo. IV., c. 74.

‡ 5 Geo. IV. c. 113.

† 5 Geo. IV., c. 95.

¶ 5 Geo. IV. c. 24.

‡ Do. c. 95.

‡ 5 Geo. IV., c. 97.

\*\* 5 Geo. IV. c. 47.

if not cited personally he must be cited personally a second time, with the words *de novo*, added: and in the event of the defender not appearing in court, he is held as acknowledging the debt or justice of the demand. Constables must cite witnesses, whose attendance may be compelled under a penalty not exceeding twenty shillings. No procurator, solicitor, writer, or attorney is allowed to appear as agent either for plaintiff or defendant, but both parties must plead their own causes *visa voce*, and upon oath, if so required. Although the non-appearance of the defender is held as confessing the debt, yet he may send an excuse by any member of his family, which, if it appears reasonable to the court, the justices may adjourn the cause to the following court day. And the court may hear either party by a member of either of their families, or by any person, not being a legal practitioner, holding a written mandatory from them, if the court thinks fit. After judgment, or decree is pronounced, a warrant for execution is granted, which cannot be enforced till after the expiry of ten free days from the date of pronouncing the decree; the charge to be given by the constable or peace officer, either personally or by leaving the same at his dwelling-house. But this act does not extend to any debt where the titles of lands, or hereditaments, wills, testaments, or marriage contracts, are involved, although the debt may not amount to five pounds: nor to any debt or thing won by gaming, betting, or play of any kind, or any demand for spirituous liquors.\*

The laws relative to qualification and summoning of jurors, and the formation of juries in England and Wales, being both numerous and complicated, it was found expedient to consolidate and simplify them. Accordingly a bill was introduced into parliament, and finally received the royal sanction on the 22d June, 1825, which enacted, that any man between the ages of twenty-one and sixty years, who, either in his own name or in trust, is seised of certain hereditaments, whether of freehold, copyhold, or customary tenure, shall be qualified and liable to serve in juries for the trial of all issues joined in any of the king's courts of record at Westminster, in the superior courts of the three counties palatine, in all courts of assize, *nisi prius*, oyer and terminer, and gaol-delivery, in the counties in which they respectively reside—both as grand and petty jurors. No alien, nor man attainted of treason or felony, or convicted of any infamous crime, unless he has received a free pardon, nor any man under outlawry or excommunication, is qualified to serve on any jury. The proper officers must summon the jurors ten days before attendance is required; and for special juries, three days. When a jury have not given their verdict, other twelve may be sworn for other issues, that no time may be lost: and, if not objected to, the same jury may try several issues in succession without being redrawn. Any man returned as a juror, may be challenged and set aside if he has not the qualification required by law, and he must be discharged if the court be satisfied of the fact; but no person arraigned for murder is admitted to any peremptory challenge above the number of twenty. No man can be again returned as a juror, who has served at *nisi prius*, or gaol-delivery, in the county of Middlesex in either of the two terms next immediately preceding, or in the other counties, &c., who has served within one year preceding. No sheriff or other officer can, under any pretence whatever, take or receive any money or reward to excuse a man from serving or from being summoned to serve on juries.†

The provisions of the late act,‡ repealing all the laws relative to the combination of workmen, not having been found effectual,—such combinations being injurious to trade and commerce, and highly prejudicial to the peace and prosperity of the kingdom,—it was found necessary to make farther provision, as well for the security and personal freedom of the individual workmen in the disposal of their skill and labour, as for the security of the persons and property of their masters and employers, and therefore the former act was repealed. It is now enacted, that if any person, by violence to the persons or property, or by threats or intimidation, or any manner of molestation or obstruction, shall force, or endeavour to force, any journeyman, &c., to depart from his hiring, employment, or work, before the same shall be finished, or prevent any journeyman, &c., from hiring himself to, or from accepting work, &c., from any person; or if any person use or employ violence to another's person or property, or by threats, molestation, or any obstruction, force or induce any person to belong to

\* 4 Geo. IV. c. 48.

† 6 Geo. IV. c. 50.

‡ 5 Geo. IV. c. 95.

any club or association, or contribute to any common fund, or to pay any fine or penalty for not belonging to such club, or for his not having complied, or refusing to comply, with any rules, orders, resolutions, or regulations made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, &c., or its management : or if any person shall by violence to the person or property of another, or by threats, intimidation, molestation, or obstruction, force, or endeavour to force, any manufacturer, &c., to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, &c. ; or to limit the number of his apprentices, journeymen, workmen, or servants : every person so offending, aiding, abetting, or assisting, on conviction, shall be imprisoned, and may be kept to hard labour for any time not exceeding three calendar months. But this act is not meant to interfere with regular meetings for the purpose of settling rates of wages to be received, or the hours of labour to be employed by the persons meeting. The act also very properly debars a master in any particular trade or manufacture, &c., from acting as a justice of the peace in any case where the offence is charged to have been committed under this act.\*

The laws received a more extensive reformation during the short reign of George IV. than any previous age had experienced ; for much of which we are indebted to the enlightened exertions of Sir Robert Peel ; his acts relate chiefly to offences against individuals, and to the administration of the criminal law generally : in connexion with this, lord Lansdowne introduced a law, which relates chiefly to offences against the person, and which will be afterwards narrated in its proper place. And as the following act is of considerable importance, as making such fundamental changes and improvements in the administration of criminal justice in England, we shall give it entire, divested however of its technicalities. It was passed, and bears date, 26th May, 1826.

I. WHEREAS, it is expedient to define under what circumstances persons may be admitted to bail in cases of felony ; and to make better provision for taking examinations, informations, bailments, and recognizances, and returning the same to the proper tribunals : and, whereas, the technical strictness of criminal proceedings might in many cases be relaxed, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence ; and the administration of justice in that part of the united kingdom called England, might in other respects be rendered more effectual. Be it therefore enacted, &c., that when any person shall be taken on a charge of felony, or suspicion of it, before one or more justices of the peace, and the charge supported by positive and credible evidence of the fact, or by such evidence as creates a strong presumption of guilt ; such person shall be committed to prison by such justices in manner herein described : but if there be only one justice present, and if the evidence be such as neither to raise a presumption of guilt, nor to warrant a dismissal of the charge, such justice shall detain the accused party, until he or she can be taken before two or more justices ; and if the evidence given before them shall not, in their opinion, be such as to raise a strong presumption of guilt, nor to require committal, but yet, notwithstanding, it shall appear to them that there is good ground for judicial inquiry, then the accused person shall be admitted to bail.

II. And before the justices of the peace shall admit to bail, or commit to prison any person arrested for felony, or, on suspicion of it, shall take the examination of such person, and the information on oath of those acquainted with the facts and circumstances of the case, and shall put as much thereof as is material in writing : and the two justices shall certify such bailment in writing, and shall have authority to bind all who know or declare any thing respecting the felony, to appear at the next court of oyer and terminer, &c., where the trial is to be, to prosecute and give evidence accordingly. The justices shall subscribe and deliver the examinations into court.

III. The third section is a repetition nearly of the former, respecting the duty of justices on charges of misdemeanor.

IV. Relates to the duty of the coroner, who, on any inquisition where any person shall be indicted for manslaughter, or murder, or the accessories, shall put the material parts of the

evidence in writing; and has authority to bind all persons by recognisances who have given evidence, to prosecute.

V. Any justice or coroner offending in any thing contrary to the true intent and meaning of these provisions, shall on a summary proof be fined.

VI. Those provisions relating to justices and coroners shall be applicable, not only to the counties at large, but to all other jurisdictions.

VII. This provides for all felonies with and without benefit of clergy, but as a subsequent act wholly abolished this privilege, the clause is rendered unnecessary.\*

VIII. And with regard to clergyable offences, if any person shall be indicted of any felony, which entitles the offender to the benefit of clergy, and on arraignment such person shall confess the felony, or stand mute of malice, or will not answer directly to the charge, or shall peremptorily challenge above the number of twenty jurymen, or shall be outlawed upon such indictment, then the offender and accessories shall be deemed and taken to be convicted of the felony; and the court shall award such judgment as if he had been convicted by verdict.

IX. If any person shall counsel, procure, or command, any other person to commit any felony, whether at common law, or by virtue of any statutes, the counsellor shall be deemed guilty of felony, and may be indicted or convicted either as an accessory before the fact to the principal felony, or after the conviction of the principal felon, may be indicted and convicted of a substantive felony, whether the principal shall or shall not have been convicted or amenable to justice, and may be punished in the same manner as any accessory convicted as such before the fact; and the accessory's offence may be inquired of, tried, determined, and punished by any court having jurisdiction to try the principal felon, wherever the offence may have been committed: if the principal felony shall have been committed in one county, and the accessory's offence in another, the accessory's offence may be tried in either of such counties.

X. Contains provisions to the same effect as the preceding section.

XI. If any principal offender shall be in any wise convicted of any felony, he shall be proceeded against, either before or after the fact, in the same manner as if the principal felon had been duly attainted, even although the principal should die, or be admitted to benefit of clergy,† or pardoned, or otherwise delivered before attainder: and the accessory shall suffer the same punishment, as, if convicted, he should have suffered, if the principal had been attainted.

XII. Provides for the trial of offences committed on the boundaries of counties, which may be tried in either county.

XIII. Offences committed on any person, or property in any coach, waggon, cart, or other carriage employed in any journey; or on board of any vessel employed on any voyage, navigable river, canal, or inland navigation, may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof such of the above vehicles shall have passed in the course of the journey or voyage: and in all cases where the side, centre, or other part of any highway, &c., or canal, &c., shall constitute the boundary of any two counties, such felony may be tried and determined in either of the said counties, in the same manner as if it had actually been committed in such county.

XIV. In any indictment or information for any felony, &c., wherein it shall be necessary to state the ownership of any property, whether real or personal, which belongs or is in the possession of more than one person; whether they be partners in trade, joint tenants, parcellers, or tenants in common; it shall be sufficient to name one of such persons, and to state that the property belongs to him, and any others as the case may be; and the above description is sufficient for indictments or informations, and the meaning of this provision extends to all joint-stock companies and trustees.

XV. In any indictment or information for a felony, &c., committed in or upon any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained in whole or in part at the expense of any county, riding, or division, or on or with respect to any goods, chattels, &c., provided at their expense, and to be used in repairs or alterations of any of these public institutions; it shall be sufficient to state that such property, real or per-

sonal, belongs to the inhabitants of such county, &c., without specifying the names of any of the inhabitants.

XVI. In any indictment for felony on any workhouse, poorhouse, or goods, &c. provided for the use of the poor of any parishes, townships, hamlets, or places; or to be used in any workhouse, or poorhouse, or to the master or mistress, or servants of the same, it shall be sufficient to state such property to belong to the overseers of the poor for the time being, without specifying all or any of their names: and in felonies on materials, tools, or implements for altering or repairing the highways within any parish, &c. otherwise than by the trustees or commissioners of any turnpike road; it shall be sufficient to aver, that such things are the property of the surveyors of the highway for the time being, and it is not necessary to specify any of their names.

XVII. With respect to any indictment or information for felony or misdemeanor, committed on any house, turnpike or other property of any description, belonging to any turnpike road, it is sufficient to state that such property belongs to the trustees or commissioners for the time being, without specifying their names.

XVIII. Any indictment, &c. for felony, &c. committed on any sewer, or other matter within or under the view, cognisance, or management of any commissioners of sewers, it is sufficient to state that such property belongs to the trustees or commissioners for the time being, without specifying their names.

XIX. No indictment or information shall be abated by reason of any dilatory plea of misnomer or want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or indictments to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been advanced.

XX. No judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter necessary to be proved, nor for the omission of the words, "as appears by the record;" or of the words, "with force and arms;" or of the words, "against the peace;" nor for the insertion of the words, "against the form of the statute;" instead of the words, "against the form of the statutes," or *vice versa*; nor for that any person or persons mentioned in the indictment or information, is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment or information to have had jurisdiction over the offence.

XXI. No verdict after judgment for any felony, &c. shall be stayed or reversed for want of a similitur, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served on the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, the indictment shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

XXII. The court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena, to prosecute, or give evidence against any person accused of felony, to order payment to the prosecutor of the costs and expenses incurred by the prosecutor; as also such sums of money as the court shall think reasonable and sufficient to reimburse the prosecutor and witnesses, for the expenses they have severally incurred in attending before the magistrates and grand jury, or in otherwise carrying on such prosecution; and also a compensation for their trouble and loss of time. It shall be still lawful for the court, when, in the opinion of the court, any person shall have attended in obedience of any such recognizance or subpoena—even although no indictment had been preferred—

to order payment to such person of such sum of money as the court shall think reasonable, for reimbursing their expenses and loss of time. And the expenses and remuneration shall be ascertained by the magistrates' certificate, granted before the trial, &c.

XXIII. Many individuals having heretofore been deterred by the expense from prosecuting persons guilty of misdemeanors, who consequently escape the punishment due to their offences; for remedy it is enacted, that when any prosecutor or other person shall appear before any court on recognizance, or subpoena, either to prosecute or give evidence against any person indicted of any assault, with intent to commit felony; of any riot, of any misdemeanor, for receiving stolen property, knowing the same to have been stolen property, of any assault upon a peace officer in the execution of his duty, or upon any person in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or its subornation; every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses, together with a compensation for trouble and loss of time, and this even if there should not have been a bill of indictment preferred.

XXIV. The officer of the court, shall forthwith make out and deliver an order to the prosecutor, on payment of the sum of one shilling for the prosecutor and sixpence for each other person, on the treasurer of the county, riding or division, in which the offence shall either have been, or supposed to have been committed; who is hereby authorized on sight of such order, forthwith to pay it.

XXV. And, as felonies and misdemeanors may be committed in liberties, franchises, cities, towns and places, which do not contribute to the payment of any county rate; but some of which raise a rate, in the nature of a county rate; therefore, such costs and expenses, shall be paid out of the rate raised by these places, in the nature of a county rate; or out of any fund applicable to similar purposes.

XXVI. For the better regulation of costs and expenses, it shall be lawful for the justices of the peace to establish, and from time to time to alter such regulations, as to the rate of any costs and expenses, to be afterwards allowed; and which regulations, having received the approbation and signature of one justice of gaol-delivery, or of great sessions for the county; shall be binding on all persons in it whatsoever.

XXVII. The judge of the court of admiralty, in all similar cases of felony committed on the high seas, is empowered to order the assistant to the counsel for the affairs of the admiralty and navy, to pay such costs, expenses, and compensation to prosecutors and witnesses; in like manner as other courts may order the treasurer of the county to pay the same.

XXVIII. When any persons shall appear to any court of oyer and terminer, &c., to have been active in the apprehension of any person charged with murder, or with feloniously, and maliciously shooting at, or with stabbing, cutting, or poisoning, or administering any thing to procure miscarriage, or with rape, or with burglary, or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, sheep-stealing, or their accessories: the court is authorized and empowered to order the sheriff of the county, &c., to pay to such assistant such sum of money, as the court shall deem a reasonable and sufficient compensation for expense, exertions, and loss of time.

XXIX. Every order for payment in the above cases, shall be made out, and delivered to the proper officer of court, on being paid five shillings; and the sheriff is authorized upon sight of such order, to pay the same, who may claim repayment of the same from the treasury.

XXX. If any man shall happen to be killed, in endeavouring to apprehend any criminal, the court, before whom the criminal shall be tried, shall order the sheriff of the county to pay to the widow of the man so killed, or to his children, or to his father and mother, as the case may be, such sum of money as the court in its discretion shall think fit.

XXXI. The practice of indiscriminately estreating recognizances, for the appearance of prosecutors, or evidence, having been found frequently productive of hardship: it is therefore enacted, that in any case where persons bound by recognizance, shall therein make default; the officer who makes out the estreaty, is required to make out a list in writing, speci-

fyng the name of every person making default, and the nature of the offence, with the residence, trade, profession, or calling of both the person and his sureties, distinguishing the principal from the sureties, stating the cause (if known); why such persons have not appeared, and whether by their non-appearance the ends of justice have been defeated or delayed; and, before recognizances are estreated to lay such list before one of the justices of the superior courts of record, who are respectively authorized and required to examine the list, and make such order, touching the estreating or putting in process any such recognizance, as shall appear to them respectively to be just. And it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justices, recorder, corporate officer, chairman, or justices of the peace, before whom respectively such lists shall have been laid.

XXXII. Repeals either partially or entirely, all acts relating to this subject, from the reign of Edward I., to the date of this act, except so far as any of the said acts relate to Scotland or Ireland, or repeal the whole or any part of any other acts, and except as to offences committed before the passing of this act.\*

On the 12th April, 1827, parliament regulated the mode of payment of bills of exchange and promissory notes which may fall due on Good-friday, or on Christmas day; so that if bills or notes are dishonoured on the day preceding either of these two days, it is not necessary for the holders to give notice of the dishonour until the day after Good-friday and Christmas day, and if Christmas day should fall on a Monday, although bills are in consequence payable on the preceding Saturday, yet notice of their dishonour is not to be given till Tuesday, being the day after Christmas day, on the 25th December, which notice is valid to all intents and purposes. And in all cases where bills and promissory notes fall due on any day appointed by his majesty's proclamation for a day of solemn fast or thanksgiving, the same shall be payable on the day next preceding, and in case of non-payment, may be noted and protested on such preceding day; but it is not necessary for the holders to give notice of the dishonour until the day next after such fast or thanksgiving day, nor till the Tuesday after, if the fast or thanksgiving day be appointed on a Monday. And from the date of this act, Good-friday, Christmas day, and every fast and thanksgiving day appointed by the king, shall be treated and considered for all purposes whatsoever, as regards bills and promissory notes as the Lord's day, commonly called Sunday. But it is expressly provided that no part of this act shall extend to Scotland. †

Many dangerous accidents, and even the loss of life having occurred, not only to trespassers, but even to the innocent, through the setting of spring-guns, traps, &c., this same parliament enacted, that from the 28th May, 1827, whosoever shall set, or cause to be set, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict any grievous bodily harm on trespassers, shall be guilty of a misdemeanor. But this prohibition does not extend to traps, &c., for the intention of destroying vermin. If any person coming into possession, shall allow traps, &c., to remain, though set up by his predecessor, shall be considered as guilty as if he had set them up himself. But spring-guns, &c., set in a dwelling-house for its protection are lawful, and do not come within the meaning of this act. Those setting spring-guns previous to the passing of this act were not liable to any punishment, and it is excepted from extending to Scotland. ‡

The frequent occurrence of cases of fraudulent bankruptcies in Scotland, occasioned the passing of an act, giving the court of judicatory jurisdiction to try them: Accordingly, after the 28th May, 1827, it is lawful to prosecute all persons accused of fraudulent bankruptcy in Scotland, before the high court or any circuit court of judicatory by indictment or criminal citations, and according to the same forms and course of proceedings as is usual in other offences prosecuted before the said courts; and the judges are authorized and empowered to try all

\* 3 Ed. I., c. 5—17 Hen. V., c. 1—18 Hen. VI., c. 12—28 Hen. VI., c. 9—1 Rich. III. c. 3. 3 Hen. VII., c. 3—25 Hen. VIII., c. 3—32 Hen. VIII., c. 2—2 & 3 Ed. VI., c. 24—5 & 6 Ed. VI., c. 10. 1 & 2 P. & M. c. 12—2 & 3 P. & M. c. 10—4 W. M. c. 8—10 & 11. W. III. c. 22—1 Anne. c. 9. Vulgo. 5 Anne. c. 21—6 Geo. I. c. 22—25 Geo. II. c. 26—27 Geo. II. c. 2—18 Geo. III. c. 19—43 Geo. III. c. 59. 43 Geo. III., c. 112—54 Geo. III., c. 72—58 Geo. III., c. 70—59 Geo. III., c. 27—59 Geo. III., c. 94. 1 Geo. IV., c. 102—3 Geo. IV., c. 28—3 Geo. IV., c. 128—6 Geo. IV., c. 56.

† 7 & 8 Geo. IV., c. 15.

‡ 7 & 8 Geo. IV., c. 18.



cases of fraudulent bankruptcy, and to inflict such punishment as is competent for those judges to award against persons convicted of the said crime. The act also enables trustees or any creditor whose claim has been received and duly ranked, with the concurrence of the lord advocate, to prosecute in either of these courts, without prejudicing the public prosecutor's title. \*

The next act we shall have to notice, is the repeal of various statutes relating to larceny, and their consolidation into one general act. *Larceny or theft* is distinguished by the law into two sorts; the one is called *simple larceny*, or plain theft unaccompanied with any other atrocious circumstance, and the other is *mixed or compounded larceny*, in which is also included, the aggravation of taking from one's house or person. Formerly, the stealing of goods above the value of twelve pence, was called grand larceny, and of that value or under, petit larceny, but the act to be rected abolished this distinction. Larceny, implies a taking any thing away without the owner's consent; and it is now fully established, that in all cases where horses and carriages are hired and never returned, if the jury are of opinion from the circumstances, that the persons to whom they are delivered intended at the time of hiring never to restore them, or that the intention to steal them or convert them to their own use existed in their minds at the time they gained possession, they are guilty of felony. And when a person hires a horse for a particular time, or to go a specific journey, and, after complying with the terms of the special agreement, sells it; his possession being then unsupported by any privity of contract, or consent of the owner, he is held to be guilty of felony. And it is now also generally held, that if the possession of property is obtained by any contrivance *animus furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into cash, or gold into silver, it amounts to felony. But when the sale of a horse or any other article is complete, and possession delivered to the buyer, who rides away with the horse, or carries off the article, without paying for it, no felony is committed. For in that case, both the property and possession is parted with, and the owner is defrauded, not of the horse or article, but only of its price, and he has his remedy by an action to recover it. It is now stated as the result of all preceding cases, that if a person obtain the goods of another by a lawful delivery without fraud, though he afterwards convert them, it is not felony: but if such delivery be obtained by any fraud or falsehood, and with an intent to steal, though under pretence of hiring, or even of purchase, (if in the latter case, it was not intended to give credit,) the delivery in fact, by the owner, will not pass the legal possession, so as to save the party from the guilt of felony. But if the property were intended to pass by the delivery, there can be no felonious taking.

If a purse is tied to the pocket by a string, or goods to a counter in a shop, and the purse is taken out of the pocket, or the goods from the counter, yet the larceny is not complete, if the string remain unbroken. But where a man snatched an ear-ring from a lady's earring, and afterwards dropt it in her hair, it was held to be a sufficient carrying away to constitute a robbery. The removal of a parcel from one end of a waggon to the other, with an intent to steal, amounts to a larceny: but in a case where a bale of goods was raised, and placed upon its end, in a perpendicular posture, this was not thought to be a sufficient carrying away, there not having been a complete removal from the space it before occupied. And also when a man was stopped and ordered by the prisoner to put a parcel down upon the ground, which he was carrying, but which the prisoner did not afterwards take up; this was not held to be a sufficient carrying away, to complete the crime of robbery. In another case, in which the prisoner had lifted a bag from the bottom of the boot of a coach, but was detected before he got it out; it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom, had completely removed each part of it from the space which that specific part had previously occupied. The judges held this to be a complete apportionment, or carrying away. †

The various enactments in the reign of George III., have made the most essential and fundamental alterations in the law, respecting the subjects of the benefit of clergy, larceny, and other offences connected therewith, but particularly an act passed 21st June, 1827; the preamble to which announces, that "it is expedient to repeal various statutes now in force in

\* 7 & 8 Geo. IV., c. 29.

† Professor Christian's notes on Blackstone.

that part of the united kingdom called England, relative to the benefit of clergy; and it is also expedient to repeal various statutes relative to larceny, and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery, or of extortion, and to embezzlement, false pretences, and the receipt of stolen property, in order that the provisions contained in those statutes may be amended, and consolidated into one act; and it is also expedient with the same views to repeal various statutes, relative to malicious injuries to property; and also, with the same view to repeal various statutes relative to remedies against the hundred." Therefore, all statutes creating subjects of larceny, which did not exist at common law, from the 9th Henry III., to the 7th George IV., c. 69, are repealed, except such as relate to the post office, or to any other branch of the public revenue, or to the public stores, bank of England, or the south sea company.\*

And on the same date, another act was passed, for consolidating and amending the laws in England, relative to larceny and other offences connected therewith. The preamble to which states, that "various statutes now in force in that part of the united kingdom called England, relative to larceny and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or of extortion, and to embezzlement, false pretences, and the receipt of stolen property, are by an act of the present session of parliament, repealed from and after the — day of June, in the present year, except as to offences committed before, or upon that day, and it is expedient that the provisions contained in these various statutes, should be amended, and consolidated into this act, and to take effect at the same time as the said repealing act."

The II. section abolishes the distinction between grand and petit larceny; and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and subject to the same incidents, in all respects, as grand larceny was in times past.

III. Any person convicted of any felony, hereby made punishable like simple larceny, shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned for any term not exceeding two years; and, if a male, in addition to be whipt, either publicly or privately, one, two, or three times, at the discretion of the court. IV. If the sentence is imprisonment, then solitary confinement, or hard labour, may be superadded. V. Stealing any tally, order, or other security, entitling any person or body corporate to any share or interest in the funds, whether of this kingdom, or of Great Britain or Ireland, or any foreign state, or any body corporate, company, or society, or to any deposit in any savings bank, or any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, subjects the offender to the guilt of felony, and to the same punishment as the stealing under like circumstances of any goods. VI. If any person rob any other person of any chattel, money, or valuable security, as above described, he shall suffer death as a felon. Assault with intent to commit robbery, and demands accompanied with menaces or force, are felony; and offenders may be transported for life, or for any term not less than seven years, or may be imprisoned for not less than four years; and, if a male, to be once, twice, or three times, either publicly or privately, whipt, in addition to the imprisonment. VII. Every person accusing, or threatening to accuse, another person of an infamous crime, with the view or intention of extorting gain from him, and who, by intimidation, does extort money, or any other thing, shall be deemed guilty of robbery, indicted and punished accordingly. VIII. The sending of letters threatening to accuse any party of an infamous crime, with the intention of extorting money, &c., subjects the offender to the guilt of felony, and, on conviction, to be transported for life, or to imprisonment for four years, and to be whipt. IX. Defines every attempt, endeavour, solicitation, persuasion, promise, or threat, to move or induce any person to the commission or permission of an infamous crime, shall be deemed such, within the meaning of this act. X. Sacrilege, that is, breaking into and entering any church or chapel, and stealing and afterwards breaking out, subjects the party to the guilt and penalty of felony, that is, death. XI. Every person convicted of burglary, shall suffer death as a felon, whether the offender breaks into the house, or, having been in, breaks out of it in the night-time. XII. An offender breaking into a house and stealing to any value, and putting any inhabitant in fear; or stealing privately to the value of five pounds, shall in either case suffer death as a felon. XIII. But no building shall be deemed part of a dwell-

ing-house, even although in the same curtilage, unless there be a communication between such building and the dwelling-house, either immediate or by means of a covered and enclosed passage, leading from one to the other. XIV. A robbery in any building within the same curtilage as the house, but not privileged as part of the house, subjects the offender to transportation for not less than seven years, or to imprisonment not beyond four years, with whipping additional. XV. Robbery in a shop or warehouse subjects the offender to any of the punishments before mentioned. XVI. Stealing to the value of ten shillings any article of silk, linen, woollen, cotton, during any stage or progress of manufacture, subjects the offender to the before mentioned punishments. XVII. Stealing goods from a vessel of any description, in any port, river, canal, or creek, dock, wharf, or quay, subjects the offenders to the above punishments. XVIII. Any person that shall plunder or steal any part of any ship or vessel in distress, wrecked or stranded, or any goods or merchandize belonging to such vessel, shall suffer death as a felon: but if articles of small value be stolen, without circumstances of cruelty, outrage, or violence, the offender shall only be punished as for simple larceny. XIX. Shipwrecked goods, found in the possession of any one who cannot give a satisfactory account of them, shall be forthwith, by order of a justice, delivered to their rightful owner, and the offender shall forfeit and pay, over and above the value of the goods, a sum not exceeding twenty pounds. XX. Shipwrecked goods exposed for sale, may be seized, and the offender fined as above. XXI. Stealing records, or other proceedings of any description whatever, from a court of justice, subjects the offender to transportation for seven years, or such other fine and imprisonment as the court may award. XXII. To steal, destroy, or conceal, either during the life or after the death of any testator or testatrix, any will, codicil, or other testamentary instrument, whether relating to real or personal estate, or to both, is a misdemeanor, and punishable as in the last section. XXIII. To steal any writings or title deeds relating to a real estate, is a misdemeanor punishable as before. XXIV. These provisions, as to wills and writings, shall not lessen any remedy which the aggrieved party had previous to the passing of this act. XXV. Stealing horses, cattle, or sheep, either for the carcase or the skin, is felony, and punishable with death. XXVI. Unlawfully to course, hunt, snare, carry away, kill or wound deer in any inclosure, is felony, and punishable as simple larceny; but unlawfully hunting, &c., in uninclosed ground is liable to a fine not exceeding fifty pounds. XXVII. Venison or snares found in the possession of any suspected person, for which he cannot satisfactorily account, shall subject him to the forfeit and payment of a sum not exceeding twenty pounds. XXVIII. Setting engines for taking deer, or pulling down park fences, shall subject the offender to pay a sum not exceeding twenty pounds. XXIX. Deer keepers, &c., may seize the guns of offenders, who do not deliver up the same on demand: and resistance to deer keepers, &c., in the execution of their duty, is felony, and punishable as simple larceny. XXX. Unlawfully killing hares or rabbits, in the night-time, in any warren or ground lawfully used for their breeding, whether it be enclosed or open, is a misdemeanor, and punishable accordingly; and if done in the day-time, shall forfeit five pounds. XXXI. Stealing dogs, beasts, or birds, ordinarily kept in confinement, and not subjects of larceny, subjects the offender for the first time to forfeit, besides the value of the animal, a sum not exceeding twenty pounds; for a second offence the party is liable to be put to hard labour in the house of correction, or the common gaol for any term not exceeding twelve months; and, if a male, he may be twice publicly whipt. XXXII. If any dog or beast, or their skins, birds or their plumage, are found in the possession or the premises of any person, he is liable to the same forfeitures and punishments as before stated. XXXIII. Unlawfully and wilfully killing, wounding, or taking any house dove or pigeon, shall, over and above the value of the bird, pay any sum not exceeding two pounds. XXXIV. Unlawfully taking or destroying any fish in any water which is situated in the land belonging to any house of which the owner has a right of fishing, is a misdemeanor, and punishable accordingly: or in any private fishery elsewhere, the offender, besides the value of the fish, shall pay a fine not exceeding five pounds: but this does not extend to anglers in the day-time. XXXV. The owner of the ground is authorized to seize the tackle of the offender; but, on the seizure of his tackle, an angler in the day-time is exempt from the penalty. XXXVI. Stealing oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any person, and sufficiently marked or known, is

larceny, and punishable accordingly; dredging for oysters within the limits of any oyster fishery is a misdemeanor punishable by fine or imprisonment, or both, at the discretion of the court. XXXVII. To steal, or to sever with the intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundate, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof, respectively, is felony, and on conviction to be punished as in the case of simple larceny. XXXVIII. To steal, cut, break, root up, or otherwise damage, with intent to steal the whole or any part of any tree, sapling, shrub, or underwood, growing in any park, orchard, garden, or pleasure ground, if the value exceed one pound, is felony, and punishable as simple larceny: and if the wood, as mentioned, be growing in any other situation, if the value stolen amount to five pounds, it is felony, and punishable as simple larceny. XXXIX. But if the damage to a tree, &c., with intent to steal, in any situation whatever, be to the amount of a shilling, the offender is liable to a fine not exceeding five pounds, and to pay the amount of damage; a second offence subjects the offender to be committed to the common gaol, or the house of correction, for twelve months with hard labour and whipping, at the discretion of the justices; and conviction of a third similar offence is felony, and punishable as in simple larceny. XL. To steal any live or dead fence, wooden fence, stile, or gate, subjects the offender to a fine not exceeding five pounds, for a first offence, besides the value destroyed or stolen; for a second, hard labour in the gaol or house of correction for one year, and, if a male, to be whipt. XLI. Any part of a tree, shrub, &c., fence, or paling, &c., found in the possession of any suspected person, who cannot give a satisfactory account for its possession, subjects the offender to a fine of two pounds besides the value of the stolen property. XLII. To steal plants, roots, fruits, or vegetable productions in a garden, subjects the offender to hard labour in the gaol or house of correction, for six months, or else to pay a fine not exceeding twenty pounds, besides the value stolen or destroyed, for the first offence; the second is felony, and punishable as simple larceny. XLIII. To steal, &c., any cultivated root or plant used for food, medicine, distilling, dyeing, or for the course of any manufacture, and growing in any field, not a garden, or orchard, or nursery ground, subjects the offender to hard labour for one month in the gaol or house of correction, or else to pay a fine of twenty shillings, for the first offence, besides the value of the articles stolen or injured; and for the second, to six months hard labour, and if a male, to be whipt. XLIV. If any person steal, rip, cut, or break with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil, or fixture, whether made of metal or other material respectively, fixed in or to any building whatsoever, or any thing made of metal, fixed on any land being private property, or for a fence to a dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament; every such offender is guilty of felony, punishable as simple larceny. XLV. Tenants and lodgers stealing any property from houses or apartments let to them, are guilty of felony, and punishable as in simple larceny. XLVI. Clerks and servants stealing their masters' property, are liable to transportation for fourteen years, or to imprisonment for three years, and if a male, to be three times publicly whipt. XLVII. Clerks and servants who have received any money, &c., on their masters' account, and afterwards embezzle it, are guilty of felonious stealing, and liable to any of the punishments last mentioned. XLVIII. Distinct acts of embezzlement may be charged in the same indictment. XLIX. Agents, merchants, brokers, &c., embezzling money, or valuable security, goods of any kind intrusted to their care, safe custody, or for any special purpose, are guilty of a misdemeanor, and liable to any of the punishments last mentioned. L. The last section, however, does not affect trustees, mortgagees, nor bankers receiving money due on securities, or disposing of securities, &c., over which they have a lien, and to the extent of that lien. LI. Factors, agents, &c., pledging for their own use any goods or documents, &c., relating to goods intrusted to them for the purposes of sale, are guilty of a misdemeanor and liable to transportation for fourteen years, or to fine and imprisonment; but this does not extend to cases where the pledge does not exceed the amount of any lien which the factor may have over the articles pledged. LII. These provisions regarding agents, did not lessen any remedy which the aggrieved party had, previous to passing the act. LIII. To obviate the subtle distinction between larceny and fraud, it is enacted, that any person obtaining under false pretences from any other person, either

money, chattels, or valuable securities, with intent to cheat or defraud, is guilty of a misdemeanor, and liable to be transported for seven years, or to fine and imprisonment at discretion. LIV. Any persons receiving money, chattels, or valuable securities, knowing the same to have been feloniously stolen or taken, is guilty of felony, and may be indicted as an accessory after the fact, or for a substantive felony; and the receiver, whether the principal has, or has not been convicted, is liable to transportation for fourteen years, or to three years' imprisonment, and if a male, to be three times whipt. LV. When the original offender is guilty of a misdemeanor only, the receivers can only be prosecuted for a misdemeanor. LVI. All receivers may be tried where the principal is triable, or where the property is found in their possession, as well as where they received the stolen goods. LVII. The owner of stolen property, prosecuting the thief or receiver to conviction, shall have restitution of his property: except any valuable security shall have been, *bona fide*, paid or discharged by some person, or body corporate, liable for its payment; or if a negotiable instrument shall have been, *bona fide*, transferred for a just consideration without a reasonable cause to suspect that the same had been stolen, &c., in which case the court shall not award restitution. LVIII. Every person taking money or reward, directly or indirectly, under pretence of assisting in the recovery of stolen goods, &c., without bringing the offender to trial, is guilty of felony, and liable to be transported for life, or to be imprisoned for four years, and if a male, to be three times publicly whipt. LIX. Any person that publicly advertises a reward for the return of any stolen or lost property, and promises a reward and that no questions shall be asked, and without seizing and making inquiry after the person producing such property, shall forfeit the sum of fifty pounds for every offence, with full costs of suit to any person who will prosecute. LX. Receivers of stolen property, when the original offence is punishable on summary conviction, is liable to the same punishment as the original offender. LXI. Every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree: and every accessory after the fact, (except only a receiver of stolen property,) is liable to two years' imprisonment: and abettors, &c., in misdemeanors, may be indicted and punished as principals. LXII. Abettors in offences punishable on summary conviction, are liable to the same penalties as the principal offenders. LXIII. A person found in the act of committing any offence, may be apprehended without a warrant, either by a peace officer, or the owner of the property, or his servant: and if any credible witness shall prove upon oath before a justice, a reasonable cause to suspect that any person has in his possession, or on his premises, any stolen property whatever, the justice shall grant a search-warrant, as in the case of stolen goods: and any person to whom goods or property are offered for sale, if he has a reasonable cause of suspicion, is authorized to apprehend the person offering the goods, and carry him before a justice. LXIV. The prosecution for every offence punishable on summary conviction, shall be commenced within three calendar months after commission, and not otherwise. LXV. When any person is charged on the oath of a credible witness, for any offence punishable on summary conviction, the justice may summon him to appear, which if he neglect, the justice may proceed to hear and determine the case, *ex parte*, or issue a warrant for his apprehension. LXVI. Every sum of money forfeited for the value of stolen or injured property, &c., shall be paid to the aggrieved party if known, and if he is unknown, it shall be applied in the same manner as a penalty: and penalties imposed by justices of the peace, shall be paid to the overseers of the poor. LXVII. If a convicted person refuses, or is unable to pay, the justice may commit him for any term not exceeding two calendar months, where the amount with costs does not exceed five pounds: not exceeding ten pounds, for four calendar months: and in any other case, not exceeding six months; but on payment of fine and costs, the imprisonment to cease. LXVIII. A justice may, if he think fit, discharge the offender for a first offence, upon his making satisfaction to the aggrieved party. LXIX. But his majesty may extend his pardon for the non-payment of the fine. LXX. A summary conviction, is a bar to any other proceeding for the same cause. LXXI. The justice before whom any person shall be convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or any other form of words, to the same effect, as the case shall require: *videlicet*,

" Be it remembered, that on the . . . day of . . . , in the year of our Lord, . . .

at . . . , in the county of . . . [or riding, division, liberty, city, &c., as the case may be], A. O. is convicted before me, J. P., one of his majesty's justices of the peace for the said county, [or riding, division, liberty, city, &c., as the case may be]: for that the said A. O. did [specify the offence, and the time, and place, when and where the same was committed, as the case may be; and, on a second conviction, state the first conviction]; and I the said J. P. adjudge the said A. O. for his said offence, to be imprisoned in the . . . [or to be imprisoned in the . . . , and then kept to hard labour], for the space of . . . , [or, I adjudge the said A. O., for his said offence, to forfeit and pay . . . ] [here state the penalty actually imposed, or state the penalty, and also the amount of the articles stolen, or the amount of the injury done, as the case may be], and also to pay the sum of . . . for costs, and, in default of immediate payment of the said sums, to be imprisoned in the . . . , [or to be imprisoned in the . . . , and then kept to hard labour,] for the space of . . . , unless the said sums shall be sooner paid; [or, and I order that the said sums shall be paid by the said A. O., on, or before the . . . day of . . . ]; and I direct, that the said sum of . . . [that is, the penalty only] shall be paid to . . . of . . . aforesaid, in which the said offence was committed, to be by him applied, according to the directions of the statute, in that case made and provided; or that the said sum of . . . , [that is, the value of the articles stolen, or the amount of the injury done], shall be paid to C. D., [the party aggrieved, unless he is unknown, or has been examined in proof of the offence, in which case state that fact, and dispose of the whole, like the penalty, as before]: and I order that the said sum of . . . , for costs, shall be paid to . . . , [the complainant]. Given under my hand and seal, the day and year first above mentioned."

LXXII. The offender may, in all cases where the fine exceeds five pounds, appeal to the next court of general or quarter sessions, which shall be holden within twelve days of his conviction. LXXIII. But no adjudication or conviction made on appeal, shall be quashed for want of form, or removed by *certiorari*, or otherwise, into any of his majesty's superior courts of record. LXXIV. Every justice must transmit convictions to the next court of general or quarter sessions for the county, &c., to be kept by the proper officer, among the records of the court, which shall be sufficient evidence to prove a former conviction. LXXV. All actions and prosecutions for any thing done in pursuance of this act, must be laid and tried in the county where the fact was committed, and within six calendar months after its commission: notice in writing of such action, must be given the defendant, one calendar month before commencement: the defendant may plead the general issue: no plaintiff can recover, if the defendant make such amends or restitution before the action is commenced, or if he has paid a sufficient sum into court: and if a verdict pass for the defendant, or the plaintiff be non-suited or discontinue the action after issue is joined, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the same remedy as any defendant hath by law in other cases: and, though a verdict shall be given for the plaintiff in any such action, he shall not have costs against the defendant, unless the judge shall certify his approbation of the action, and the verdict obtained. LXXVI. This act does not extend to either Scotland or Ireland, except in two cases: that is, if any person, having stolen or feloniously taken any chattel, money, valuable security, or other property whatsoever, in any one part of the united kingdom, and shall afterwards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft, in that part of the united kingdom where the property shall be found in his possession, in the same manner as if he had actually stolen or taken it in that part: and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence, in that part of the united kingdom where he shall receive the property, in the same manner as if it had been originally stolen or taken in that part. LXXVII. Any felony or misdemeanor punishable under this act, committed within the jurisdiction of the admiralty of England, shall be dealt with, inquired of, tried, and determined, in the same manner as any other felony or misdemeanor, committed within that jurisdiction.\*

\* 7 &amp; 8 Geo. IV., c. 29.

Although we have placed the preceding act before that which we are now about to quote, on account of its consolidating and amending all the acts on larceny and the benefit of clergy, which the act immediately before it \* had repealed; yet, in the order of the statute book, the act of 21st June, 1827, for farther improving the administration of justice in criminal cases, stands before it. The last cited act owes its existence to Sir Robert Peel, and relates almost entirely to offences against the property of individuals, and to the administration of the criminal law generally. At a future stage of this article, we will give lord Lansdowne's act, which relates to offences against the person, and is intended to amend lord Ellenborough's act, which we have already given in its chronological order, in the reign of George III. † The preamble of this act narrates generally, that some of the forms attending trials for criminal offences in England, frequently impede the due administration of justice; the legislature, therefore, considered it necessary and expedient to abolish these unnecessary forms and also the benefit of clergy, and to make better provision for the punishment of offenders in certain cases. Any person, not having the privilege of peerage, being arraigned on any indictment for treason, felony, or piracy, and pleading "not guilty;" such a plea, without any other form, shall put the prisoner on his trial by jury. If the prisoner shall stand mute of malice, or will not answer directly to the indictment or information, the court shall order the proper officer to enter a plea of "not guilty" in the prisoner's behalf, which shall be as effectual as if he had, himself, pleaded not guilty. If the prisoner challenge, peremptorily, a greater number of the jury than he is entitled by law to challenge, the challenges beyond the legal number is void, and his trial shall proceed as if no challenge had been made. No attainder for another crime shall be pleadable in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment. In an indictment for treason, or felony, the jury shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony. The sixth section of this important act enacts, that benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing in this act shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this act. No person convicted of felony shall suffer death, unless it be for some felony which was before excluded from the benefit of clergy, or which shall be made punishable with death by some future statute. Every person convicted of any felony, not punishable with death, shall be punished as the statutes relating to such felony shall direct, and when no punishment has or hereafter may be specially provided, they shall be punished under this act, and liable at the discretion of the court to be transported for seven years, or imprisoned for two years; and if a male, to be three times publicly or privately whipped; and, besides, the court may sentence the offender to be imprisoned and kept to hard labour in the common gaol or house of correction, and if necessary, the court may order solitary confinement as part of the sentence. If a person already imprisoned for another crime, is convicted of felony, the court may award imprisonment a second time, to commence after the expiration of the first period; and if under sentence of transportation, the court may pass sentence of transportation for the subsequent offence, to commence from the expiration of the first period; although the aggregate term of imprisonment or transportation, respectively, may exceed the term for which either of those punishments could otherwise be awarded. If any person shall be convicted of any felony, not punishable with death, which has been committed after a previous conviction for felony, he shall, on a subsequent conviction, be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years, and if a male, to be three times whipped in addition: and it shall be sufficient in any subsequent indictment to state generally, that the offender was at a certain time and place convicted of felony, without otherwise describing it, on a certificate containing the substance and effect, by the clerk of the court where the conviction took place: which clerk shall be guilty of felony, if he gives a false certificate, and liable to transportation for seven years. All offences prosecuted in the high court of admiralty of England, for every first and subsequent conviction, are subject to the same punishment, whether of death or otherwise, as if such offences had been committed on land. When the king's majesty shall be pleased to extend

\* 7 & 8 Geo. IV., c. 27.

† 43 Geo. III., c. 86.

his royal mercy to any offender convicted of a felony, punishable with death or otherwise, and, by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender, either a free or a conditional pardon; his discharge out of custody in the former case, or his performance of the conditions in the latter, shall have the effect of a pardon under the great seal; but this pardon does not affect the offender, nor hinder his punishment, for any subsequent felony or offence. Whenever this statute or any other relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence, or the subject-matter, on, or with respect to which it shall be committed, or the offender or party affected, or intended to be affected, by the offence, hath used or shall use words importing the singular number, or the masculine gender only; yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved. But nothing in the act shall extend to Scotland or Ireland. \*

In consequence of the repeal of so many acts relative to malicious injuries done to property, it became necessary to consolidate the laws and make an enactment which should embody the whole into one act, to take effect at the same time, as the said repealing act: accordingly, unlawfully or maliciously to set fire to any church or chapel, or to any duly registered or recorded dissenting chapel, or to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building used for any trade or manufacture, whether the same shall be in the possession of the offender or of any other person, with intent to injure or defraud any person, is felony, and the offender shall suffer death. Maliciously to cut, break, or destroy, or damage, with intent to destroy, or to render useless, any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or with any other material, or any frame-work, knitted piece, stocking, hose, or lace, respectively being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or any warp or shute of silk, woollen, linen, or cotton, whether mixed or singly, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, frilling, shearing, or otherwise manufacturing or preparing such goods or articles; or shall forcibly enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, is felony, and liable to transportation for life, or not less than seven years, or four years' imprisonment, and to be three times whipped. To cut, break, or destroy, or damage, with intent to destroy or render useless, any threshing machine, or machine or engine, whether fixed or movable, prepared for or employed in any manufacture whatsoever, is felony, and liable to transportation for seven years, or to imprisonment for two years; and, if a male, to be three times whipped. To set fire to a coal mine is felony, punishable with death. To drown any mine or to fill up any shaft, air-way, water-way, drain, pit, level, or shaft, belonging to any mine, is felony, liable to seven years' transportation, or two years' imprisonment, with whipping if a male: but this does not implicate any owner in working another shaft or mine. To destroy any engine or steam engine, staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether they be completed or in an unfinished state, is felony. Rioters demolishing or destroying any building, machinery, or materials as before mentioned, are guilty of felony, and the offenders shall suffer death. Maliciously to set fire to, or otherwise cast away or destroy, any ship or vessel, whether complete or in an unfinished state, so as to prejudice any owner or part owner, or the goods on board, or the freight, or the underwriters, is felony, and punishable with death. To damage or destroy a ship or vessel, otherwise than by fire, is felony, and liable to transportation for seven years, or two years' imprisonment with whipping. To exhibit any false light or signal, with intent to bring a ship into danger, or to cause her to be wrecked, or by force to impede any person endeavouring to save his life from



any wreck, &c., is felony, and liable to death. To break or cut down any sea-bank or wall, or the bank or wall of any river, canal, or marsh, which may occasion the overflow or damage of any lands, or even to endanger their overflow or damage; or to throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, is felony and liable to transportation for life, or imprisonment for four years, and if a male, to be whipt. To cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or wall, or that of any river, canal, or marsh; to draw up any floodgate, or to do any other injury or mischief to any navigable river or canal, so as to injure its navigation, is felony, and liable to transportation for seven years, or to two years' imprisonment, with whipping. To pull down or injure a public bridge, or to render it impassable or dangerous, is felony, and liable to transportation for life, or to four years' imprisonment, and whipping. To throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, wall, chain, rail, post, bar, or other fence belonging to a turnpike-gate, &c., or any house, building, or weighing engine belonging to it, &c., is a misdemeanor, and punishable accordingly. To break down or destroy the dam of any fish pond, or water which is private property, or where there is any private right of fishery, with intent to destroy the fish, or to put lime or any other noxious material into such pond, &c., intending to destroy the fish, is a misdemeanor, liable to seven years' transportation, or to two years' imprisonment, and whipping. To kill, maim, or wound any cattle, is felony, liable to transportation for life, or to four years' imprisonment, and whipping. To set fire to any stack of corn, grain, pulse, straw, hay, or wood, is felony, and liable to death. To set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, whosoever the same may be growing, is felony, and liable to transportation for seven years, or to two years' imprisonment, and whipping. To destroy hop binds growing on poles, is felony, and liable to transportation for life, or to four years' imprisonment, and whipping. To cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, if the injury exceed one pound in value, is felony, and the offender is liable to seven years' transportation, or to two years' imprisonment, and whipping: the like injuries done to trees, &c., growing in any other situation, if exceeding the amount of five pounds, are felony, and the offender is liable as before. To damage, as before, whosoever the trees, &c., are growing, to the value of one shilling, on conviction before a justice of the peace, the offender shall forfeit and pay, for the first offence, over and above the amount of the injury done, any sum not exceeding five pounds; and every offender, for a second offence, shall be committed to the common gaol, or house of correction, to be kept at hard labour, not exceeding twelve months; a third offence is felony. To destroy or damage, with intent to damage, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hot house, green house, or conservatory, subjects the offender to a summary punishment—to be committed to the common gaol, or house of correction, and kept to hard labour for any term, not exceeding six calendar months, or else to forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; but a second offence, is felony. Maliciously destroying or damaging, with intent to destroy any cultivated root or plant, used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for any manufacture, and growing in any land, either open or enclosed, not being a garden, orchard, or nursery ground, subjects the offender, on conviction before a justice of the peace, to be imprisoned only in the common gaol or house of correction, or to be imprisoned and kept to hard labour for any term not exceeding one month, or else to forfeit and pay for the injury done, a sum of money not exceeding twenty shillings, and failing payment and costs, shall be committed as aforesaid; a second offence subjects the offender to hard labour and whipping. Maliciously cutting, breaking, or throwing down any wall, stile, or gate, or part thereof, subjects the offender for the first offence, to forfeit and pay, besides the value of the thing injured, a fine not exceeding five pounds; for the second to imprisonment and hard labour for two calendar months. Any person wilfully or maliciously committing any damage, or injury, or spoiling any real or personal property whatsoever, either public or

private, for which no remedy or punishment has been provided, shall forfeit and pay such fine as shall appear to the justices to be a reasonable compensation for the damage, not exceeding the sum of five pounds: in the case of private property, the fine is to be paid to the injured party, except when the party has been examined in proof of the offence: and in such case, and in the case of public property, or where any public right is concerned, the money shall be applied as is hereafter directed: if the offender does not immediately pay the fine, the justice may commit him to gaol and hard labour, not exceeding two months, unless the fine be sooner paid. This act, however, does not extend to any case where the injury is not done maliciously and wilfully, as in hunting, fishing, &c. Malice against the owner of property, is not essential to any offence under this act. Every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the first principal; every accessory after the fact, is liable to two years' imprisonment, and aiders, abettors, and counsellors, are liable to be indicted and punished, as principal offenders. The court may order for all offences within this act, hard labour or solitary confinement, at their discretion. Persons detected in the act of committing any of these offences, may be immediately apprehended by any peace officer, by the owner of the property, or by his servants, without a warrant, and taken before a justice of the peace. The prosecution for any of these offences must be commenced within three calendar months after the commission, and not afterwards. When any person shall be charged on the oath of a credible witness, before any justice of the peace, with any of these offences, he may summon the offender, and if he does not appear at the time and place appointed accordingly, the justice may either proceed to hear and determine the case, *ex parte*, or issue his warrant for apprehending the offender, and bringing him before himself or some other justice, when the case shall be heard and determined. Any person who shall aid, abet, counsel, or procure the commission of any of these offences, shall be liable for every first, second, or subsequent offence, to the same forfeiture and punishment as the principal offender. All forfeitures for the amount of any injury, shall be paid to the party aggrieved, if known, except when the party has been examined in proof of the injury, in which case, and when the injured party is unknown, it shall be applied in the same manner as a penalty: and all penalties by any justice of the peace, shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, for the use of the general rate of the county, riding, or division in which such parish or township is situated. In every case of a summary conviction, where the forfeit or penalty shall not be immediately paid after conviction, the justice may commit the offender to the common gaol or house of correction, to be simply imprisoned, or to be kept to hard labour, in addition, according to the discretion of the justice, for any term not exceeding two calendar months, where the penalty or forfeiture with costs does not exceed five pounds, for any term not exceeding four calendar months, where the sum does not exceed ten pounds: and not exceeding six calendar months in any other case: in each of the aforesaid cases, the commit is to be determined, on payment of the amount and costs. Justices may discharge offenders on a first conviction, if they think fit, on satisfaction of the injured party for damages and costs. The king's pardon releases the offender from imprisonment, for non-payment of fines and penalties to any party, other than the crown. A summary conviction is a complete bar to any other proceedings for the same cause. Offenders, who may think themselves aggrieved by the forfeiture or penalty being greater than is warranted by this act, may appeal to the next court of general or quarter sessions, which shall be holden in not less than twelve days after conviction, for the same county, &c., provided that the offender gives the complainant a notice in writing of such appeal, and its cause, within three days after conviction, and seven clear days at least, before the sessions, and besides, shall either remain in custody till the sessions, or enter into recognizances to appear and abide the judgment of the court, which shall hear and determine the appeal, and make such order therein, with, or without costs, as to the court shall seem meet: and in case of the dismissal of the appeal, or affirmation of the conviction, shall adjudge the offender to be punished according to the conviction, to pay the costs, and if necessary, to issue process for enforcing the judgment. No such conviction or adjudication, made on appeal, shall be quashed for want of form, nor be removed by *certiorari*, or otherwise, into any of his majesty's superior courts of record: and no warrant of commitment,

shall be void from any defect in it. Every justice of the peace, shall transmit all convictions to the next court of general or quarter sessions, for the same county, &c., which shall be kept among the records of the court, a copy of which, properly certified, shall be a sufficient evidence in a subsequent offence, to prove a former conviction. All actions and prosecutions against offenders, must be laid and tried in the county where the fact was committed, and must be commenced within six calendar months after the fact, and not otherwise: notice in writing must be given the offender, at least one calendar month before the commencement of the action: the defendant may plead the general issue, and give this act, and the special matter in evidence at such trial: and if the defendant tender sufficient satisfaction before the action, or if he pay a sufficient sum into court, after the action has been brought, no plaintiff shall recover damages: if the defendant have a verdict, or the plaintiff is nonsuited, or discontinue the action after joining issue, or upon demurrer, or otherwise, judgment shall be given against the plaintiff, the defendant shall recover costs. The provisions of this act are entirely confined to the realm of England, and do not extend to either Scotland or Ireland: but they comprehend all felonies or misdemeanors committed at sea, within the jurisdiction of the high court of admiralty.\*

The fundamental alterations in the laws respecting property, which have just been detailed, required also some amendment in the statutes respecting remedies against the hundred, for damages occasioned by riotous and tumultuous assemblages of people; an act was accordingly passed on the 21st June, 1827, for amending and consolidating the laws into one act, and all preceding acts relating to the hundred, were at the same time repealed. Besides, it was enacted, that if any church or chapel, or any duly registered and recorded chapel, for the religious worship of persons dissenting from the united churches of England and Ireland, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn or granary, or any building or erection, used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or movable, prepared for, or employed in any manufacture, or in any branch thereof, or any steam engine, or other engine, for sinking, draining, or working any mine, or any stall, building, or erection, used in conducting the business of any mine, or any bridge, waggon way, or trunk, for conveying minerals from any mine, shall be feloniously demolished, pulled down or destroyed wholly, or in part, by any persons riotously and tumultuously assembled together; in any such case, the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damaged by the offence, not only for the damage so done to any of the subjects herein before enumerated, but also for any damage which may at the same time be done by any such offenders, to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid. This act is however confined to the kingdom of England, and does not extend to either Scotland or Ireland. †

We have now arrived at that period of our legal history, where it had been determined by the government to alter the whole of the fundamental laws of the kingdom, in so far as they affected the political state of the Roman catholic portion of our fellow subjects; the first step towards which, was the repeal of the act of Charles II., commonly known by the name of the TEST ACT, ‡ which was passed in the year 1673. By this statute, all officers, civil and military, are directed to take the oaths, and make the declaration against transubstantiation, either in the court of king's bench or chancery, the next term, or at the next quarter sessions, or (by subsequent statutes,) within six months after their admission: and also within the same time, to receive the sacrament of the Lord's supper,

\* 7 &amp; 8 Geo. IV., c. 30.

† 7 &amp; 8 Geo. IV., c. 31.

‡ 23 Car. II., c. 2.

according to the usage of the church of England, in some public church, immediately after divine service or sermon, and to deliver into court a certificate thereof, signed by the minister and church-wardens, and also to prove the same by two credible witnesses upon forfeiture of £500, and disability to hold the same office. Besides this penalty, if, without taking the sacramental qualification within the time prescribed by the act, a person continued to occupy a civil office, or to hold a military commission, and was lawfully convicted, then he was disabled from thenceforth for ever from bringing any action in course of law, from prosecuting any suit in any court of equity, from being guardian of any child, or executor, or administrator of any person, as well as from receiving any legacy.\* The corporation act was at the same time repealed, which prevented any person from being legally elected to any office, relating to the government of any city or corporation, unless, within a twelvemonth before, he had received the sacrament of the Lord's supper, according to the rites of the church of England, and which also enjoined him to take the oaths of allegiance and supremacy when he took the oath of office, otherwise his election was void.

The word *test* signifies *proof* or *trial*, being derived from *testis*, a *witness*. The test act was established with a view to exclude Roman catholics only from any share in the government, but it also operated to the exclusion of English protestant dissenters generally. By the corporation act, all non-conformists were turned out of every department of the magistracy at once, and rendered incapable of serving their country in the offices of common councilmen, burgesses, or bailiffs of any corporation. It was passed at a period of great heat and violence, the year after the Restoration; and it paved the way for the act of uniformity, which soon after passed. The king, his ministers, and the majority of both houses, disliked the presbyterians, whom they considered as the authors of the late rebellion. Great power still remained in their hands, for, during the protectorate, they had been appointed magistrates in all the country towns. It appeared to the government and parliament to be dangerous to leave power in such hands: it was therefore judged expedient to regulate the corporations, and to expel those magistrates, whose principles were inimical to the civil and ecclesiastical constitution of the kingdom. In this the corporation act originated. At first, the sacramental clause was intended to operate solely against the Romanists; for, by dispossessing the presbyterians, the other provisions of the statute had established the influence of the crown in all the corporations of the kingdom; because the parliament was apprehensive, that in the next reign, under the influence of a popish king, all the corporation offices would be filled with Romanists. Besides, before the passing of the act of uniformity, those who were afterwards

\* 13 Car. II., c. 2.

called dissenters, were then within the inclosure of the church, and consequently participated in her sacraments, so that the sacramental clause must therefore have been intended as a guard against the Romanists, to whom it most effectually applied, and not against those who were afterwards called dissenters, on whom, before the act of uniformity was passed, it could not operate, because they *then communicated* with the established church. It must also be allowed, that the original design of the test, was not so much to exclude the protestant dissenters as the Romanists. It was brought in under the well-founded apprehension of popery, and a popish successor to Charles II.; and when it was observed, during the debate in the commons, that it was drawn in such a manner as to comprehend the protestant dissenters, the court endeavoured to avail themselves of that circumstance to defeat the bill: but the dissenting members declared, that they would rather confide in the justice and generosity of parliament, to pass some future bill in their favour, than be the occasion of retarding or defeating the security, which the present bill was calculated to afford to the liberties of their country. Their patriotism produced soon afterwards a bill for their relief from the penal laws, but the prorogation of parliament prevented its passing. Nevertheless, a bill passed the house annually, to indemnify dissenting members, who had either neglected, or conscientiously declined taking the sacrament, so that, in effect, the test with respect to them was a dead letter. The particular test of receiving the sacrament, according to the rites of the church of England, was calculated to exclude the papists, rather than the protestant dissenters; as it was not an uncommon thing for the latter at that time, to receive the sacrament occasionally in the church of England, in order to express their charity towards it, as a part of the church of Christ. If it had been the design of the legislature to exclude all from civil offices but those who have a real affection for the constitution and the worship of the church, it is apprehended they would have appointed the test to have been a stated and constant conformity to its religious services, and not merely once taking the sacrament at church.

The disqualifying laws just mentioned, having been frequently the subject of public discussion, and although now altogether set to rest by their repeal, it may not be altogether uninteresting to state some of the arguments for and against their repeal, which have been urged from time to time, in as concise a manner as possible. The general principles advanced, then, are as follow:—Every man has an undoubted right to judge for himself in matters of religion; nor should any mark of infamy, or any civil penalty be attached to the exercise of this right:—Every man has a right to the common privileges of the society in which he lives; and among these privileges, a capacity in law for serving his sovereign and country, is one of the most valuable, distinguishing a *legal capacity* of service from a *right* to an actual appointment, which depends upon the choice of his

sovereign, or of his fellow subjects ; and this capacity of serving the state, is a right of such high estimation, and of such transcendent value, the exclusion from it is deemed a proper punishment for some of the greatest crimes :—Actions, and not opinions, political or religious, are the proper objects of human authority and cognizance :—No man who does not forfeit that capacity of serving his sovereign and country, which is his natural right, as well as the honours and emoluments which may happen to be connected with it, by overt acts, ought to be deprived of them ; and disabilities which are not thus incurred, are unjust penalties, implying both disgrace and privation :—Punishment, without the previous proof of guilt, cannot be denied to be an injury ; and injuries inflicted on account of religion, are undoubtedly persecutions :—The ends of civil society can never justify any abridgment of natural rights, that is not essential to these ends :—The institutions of religion, and the ordinances of civil government, are distinct in their origin and objects, in the sanctions that enforce them, and the mode in which they are administered :—The institution of the Lord's supper, being wholly of a religious nature, and appointed merely as a memorial of his death, is improperly applied to the secular ends of civil society : and if it be so applied, it is not only an improper, but in many cases an insufficient test of the principles and character of those to whom it is administered. Such are some of the leading principles which have been the subjects of discussion in the debates that have occurred, both among writers and among our legislators, in considering the expediency of repealing the Test Act. Many of these arguments apply equally to the Romanist and to the protestant dissenters, but we shall chiefly restrict ourselves to the pleas of the dissenters. They repeatedly urged, that being well affected to the sovereign and to the established government, and ready to take the oaths required by law, and to give the fullest proof of loyalty, they thought their scruples to receive the sacrament after the manner, either of the church of England, or of any other church, as a qualification for an office, ought not to have incapacitated them to hold public employments, either civil or military : they also alleged, that the occasional communicating as a qualification for a place, cannot in the nature of things imply, that those who thus receive it, mean to declare their full and entire approbation of the whole constitution and frame of the established church. Some men may be compelled by their necessities, or under the allurements of secular advantages, to do what they would not do, if they were left to their own free choice ; others, perhaps, may comply with the sacramental test who are not even Christians, and who therefore cannot be supposed to wish well to Christianity itself, or to any national establishment of it whatsoever. Hence they were led to think it could not be any real or effectual security to the church of England. Conceiving that they had a right, as men, to think for themselves in matters of religion, and that this right is

prescribed and sanctioned by the Author of Christianity : and that they had a right, as subjects, to a common chance with their fellow subjects, for offices of a civil and military trust, if their sovereign or fellow citizens should have thought them worthy of confidence : they could not bring themselves to the opinion, that any of the ends or objects of civil society require, that these rights should be superseded, and they should have been excluded from the service of the state. Their advocates pleaded on their behalf, that the continuance of those acts which they said invaded their rights, is so far from being necessary to the well-being of the state, or to the establishment of the national church, that they were actually pernicious both to the state and to the church, and therefore they contended that they ought to be repealed. Their inutility was shown by referring to the higher trust of legislative authority, to which dissenters were always admitted without hesitation or reserve. It was contended that an exciseman did not sustain a more important office, neither was it requisite that he should make a profession of his Christian faith, more than a member of the houses of commons or peers. The principles of the dissenters, their attachment to the constitution, and their zeal in its support, have been sufficiently manifested, in a variety of instances, ever since the Revolution, and that, therefore, the exclusion from their service of the public was neither necessary nor beneficial to the state : and that the continuance of their disabilities was unnecessary for the safety and honour of the church. An ecclesiastical establishment requires a legal provision for its ministers, but it does not require for its laity, any exclusive privilege or right to civil and military trusts. The establishment of the church of England consisted, they said, in her tithes, her prebendaries, her deaneries, and her bishoprics. These constituted her establishment before the corporation and test acts had any existence, and in the event of a repeal they would still continue to constitute her establishment. There were no such acts in Scotland where there is an establishment. In Ireland these acts had been repealed, and yet the established church of Ireland remained. There were no such acts in Holland, Russia, Prussia, Germany, &c. Upon an appeal to history, it has been argued that the civil government maintained itself in former times, when *unconnected* with the church. In this connexion we may refer to the speech of Mr Fox, an able advocate for the repeal of the disabling statutes ; who maintained that no human government had any right to inquire into men's private opinions, to presume that it knows them, or to act on that presumption. " Men," said he, " should be tried for their actions, and not for their opinions. If this was true with respect to political, it was, he said, more peculiarly so with regard to religious opinions. In the position that men's actions, and not their opinions, were the proper objects of legislation, he contended that he was supported by the general tenor of the laws of the land. History, however, afforded one ex-

ception in the case of the Roman catholics. The Roman catholics, or rather the papists, as they were then properly denominated, had been then supposed by our ancestors to entertain opinions that might lead to mischief in the state. But it was their acknowledging a *foreign* authority paramount to that of the crown, and not their opinions which justly alarmed our ancestors: their political opinions, therefore, which they attached to their religious creed, were dreaded and justly dreaded, as inimical to the constitution. Laws were, therefore, enacted to guard against the pernicious tendency of their political opinions: and the principle thus adopted," continued Mr Fox, "if not founded on justice, was at least followed up with consistency. Their influence in the state was feared, and they were not only restricted from holding offices of power or trust, but rendered incapable of purchasing lands, or acquiring influence of any kind."

On the other hand, Mr Pitt admitted as a general principle, that the religious opinions of any set of men were not to be restrained or limited, unless they should be found likely to prove the source of inconvenience to the state: nor ought the civil magistrate, in any other point of view, to interfere with them; but he maintained that when religious opinions are such as *may* produce a civil inconvenience, the government has a right to guard against the probability of that civil inconvenience being produced; nor ought they to wait till, by being carried into action, the inconvenience has actually arisen. It was not, therefore, on the ground, that the dissenters *would* do any thing to affect the civil government of the country, that they had been excluded from civil offices; but that if they had any additional degree of power in their hands, they *might use it* to affect not only the civil government, but the established church. He also contended that *an established church is necessary to the civil government of a country*; and, of course, that a settled provision for its ministers is requisite; and, also, consequently, that it was highly improper, and even dangerous to its safety, to distribute its offices and emoluments among men who were hostile to its government, its discipline, and its principles, however respectable their characters might otherwise be in private life. He maintained that this prohibition from office was neither meant by the legislature, nor in fact did it operate, as any degradation, disgrace, or punishment on dissenters. These laws existed for many years, with great advantage, as a guard and fence to the established church, and few or no prosecutions for their breach have ever been attempted: it had been long the custom to *pass an annual indemnity act to protect all dissenters* who entered parliament, or who accepted offices from the pains and penalties of the test and corporation acts, and in corporate towns, and many public offices, the obligation to qualify was, in fact, considered as a kind of dead letter, long before the act was repealed, and an informer would have been thought an



odious character. And the fourth section of the twenty-fifth article of the union between the kingdoms of England and Scotland expressly stipulates, that no test whatever shall be exacted from the native subjects of Scotland, members of the true protestant presbyterian establishment of that kingdom—"and further, her majesty, with advice aforesaid, expressly declares, and statutes, that none of the subjects of this kingdom shall be liable to, *but all and any one of them for ever free from, any oath, test, or subscription within this kingdom*, contrary to, or inconsistent with, the foresaid true protestant religion and presbyterian church government, worship, and discipline, as above established, and that the same within the bounds of this church and kingdom, shall never be imposed upon, or required of them in any sort."

An act for repealing so much of several acts, as imposes the necessity of receiving the sacrament of the Lord's supper as a qualification for certain offices and employments, repeals 13 Car. II., c. 2., the 25 Car. II., c. 2., and the 16 Geo. II., c. 30; so much of them, at least, as imposes the necessity of receiving the sacrament according to the rites of the church of England. II. And whereas, the protestant episcopal church of England and Ireland, and the doctrine and discipline thereof, and the protestant presbyterian church of Scotland, and its doctrine, discipline, and government, are by the laws of this realm, severally established, permanently, and inviolably; and whereas, it is just and fitting, that on the repeal of such parts of the said acts as impose the necessity of taking the sacrament of the Lord's supper, according to the rites and usage of the church of England, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof: be it therefore enacted, that every person who shall hereafter be placed, elected, or chosen, in, or to, the office of mayor, alderman, recorder, bailiff, town-clerk, or common council-man, or in, or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough, or cinque port, within England and Wales, or Berwick-upon-Tweed; shall, within one calendar month, next before, or upon his admission into any of the aforesaid offices, or trusts, make, and subscribe the declaration following:—

"I, A. B., do solemnly, and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence, which I may possess by virtue of the office of . . . to injure, or weaken the protestant church, as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights, or privileges, to which such church, or the said bishops and clergy, are, or may be, by law, entitled."

III. The said declaration shall be made and subscribed as aforesaid, in the presence of such person, or persons, respectively, who by the charters or usages of the said respective cities, corporations, boroughs, and cinque ports, ought to administer the oath, for due execution of the said offices, or places, respectively, and in default of such in the presence of two justices of the peace of the said cities, corporations, boroughs, and cinque ports, if such there be, or otherwise in the presence of two justices of the peace, of the respective counties, &c., wherein they are situated: which said declaration shall either be entered in a book, roll, or other record of the city, &c. IV. If any person placed, elected, or chosen, into any of the aforesaid offices or places, shall omit, or neglect to make and subscribe the said declaration, in manner above mentioned, such placing, election, or choice, shall be void; and it shall not be lawful for such person to do any act in the execution of the office, or place, into which he shall be chosen, elected, or placed. V. Every person who shall hereafter be admitted into any office or employment, or who shall accept from his majesty, his heirs and successors, any patent, grant, or commission, and who by his admittance into such office, &c., or acceptance of the same, or by the receipt of any pay, salary, fee, or wages, by reason thereof, would by the laws in force immediately before the passing of this act have been required to take the sacrament of the Lord's supper, in the church of England, shall, within

six calendar months after his admission to such office, &c., or his acceptance of such patent, &c., make and subscribe the aforesaid declaration, or in default thereof, his appointment, &c., shall be wholly void. VI. The aforesaid declaration shall be made and subscribed, in his majesty's high court of chancery, or in the court of king's bench, or at the quarter sessions of the county, &c., where the person resides: and the court in which such declarations shall be made and subscribed, shall cause the same to be preserved among the records of the said court. VII. Provided, always, that no naval officer below the rank of rear-admiral, and no military officer below the rank of major-general in the army, or colonel in the militia, shall be required to make, or subscribe, the said declaration, in respect of his naval or military commission: and that no commissioner of customs, excise, stamps, or taxes, or any person, holding any of the offices, concerned in the collection, management, or receipt of the revenues, which are subject to the said commissioners, or of the post-master general, shall be required to make, or subscribe the said declaration, in respect of their said offices, or appointments: provided, also, that nothing herein contained, shall extend to require any naval, or military officer, or other person, as aforesaid, upon whom any office, place, commission, appointment, or promotion, shall be conferred, during his absence from England, or within three months previous to his departure from thence, to make and subscribe the said declaration, until after his return to England, or within six months after. VIII. All persons now in the actual possession of any office, command, place, trust, service, or employment, or in the receipt of any pay, salary, fee, or wages, in respect of, or as a qualification for which, by virtue of, or under any of the previous acts, they respectively ought to have heretofore taken, or ought hereafter to receive, the said sacrament of the Lord's supper, shall be, and are hereby confirmed in the possession and enjoyment of their said several offices, commands, places, trusts, services, employments, pay, salary, fees, and wages, respectively, notwithstanding their omission or neglect to take, or receive, the sacrament of the Lord's supper, and are hereby indemnified, freed, and discharged from all incapacities, disabilities, forfeitures, and penalties whatsoever, already incurred, or which they may hereafter incur, in consequence of neglect or omission, and that no election of, or act done, or to be done, by any such persons, or under their authority, and not yet avoided, shall be hereafter questioned, or avoided, by reason of any such omission, or neglect; but that every such election and act shall be as good, valid, and effectual, as if they had duly received the sacrament of the Lord's supper. IX. Provided, nevertheless, that no act done in the execution of any of the corporate, or other offices, places, trusts, or commissions, by any person omitting, or neglecting, shall, by reason thereof, be either void, or voidable, as to the rights of any other person not privy to such omission or neglect, or render him liable to any action or indictment.\*

The following act was introduced into parliament by the marquis of Lansdowne, and relates to offences against the *person*, being a continuation of the improvements in the administration of the criminal law of the kingdom, generally accomplished by Sir Robert Peel's acts, which related principally to offences against the *property* of individuals. The first section repeals the whole or parts, of between fifty and sixty acts of parliament passed from the 9 Henry III. to the 3 George IV. The second section blots the crime of petit treason entirely from the statute book. Petit treason was either when a servant killed his master, a wife her husband, or an ecclesiastical person his bishop, to whom he owed faith and obedience. These crimes, especially the second instance, have in almost all ages and countries, been distinguished from the ordinary crime of murder. With regard to the different kinds of criminal homicide, murder, and manslaughter, the law is left pretty much in the same state as it was before; † but one or two alterations have been introduced. The act of Henry VIII. provided that a subject of the king who committed murder in a foreign state, might be tried in any county which the king should appoint; but in this case, an examination of the accused party must first have taken place before the king's counsel, or three of them. ‡ This was afterwards extended to accessories before the fact; but the seventh section of lord Lansdowne's act, directs justices of the peace to proceed against the offender, as if the murder had been committed within his ordinary jurisdiction. The trial is to take place in the ordinary way by a jury of the county; and persons entitled to the benefit of peerage, are

\* 9 Geo. IV., c. 17.

† 33 Geo. III., c. 25.

‡ 43 Geo. III., c. 113.

to be dealt with as heretofore. The crime of accessory after the fact to murder, instead of being a capital felony, with benefit of clergy, as formerly, is now punishable by transportation for life, or imprisonment, with or without hard labour. An aggravated case, in which one Howard attempted murder by means of a *blunt* weapon, induced the legislature to extend the principle of lord Ellenborough's act, far beyond its original limits. The case alluded to could not be dealt with as a capital offence, although the circumstances were exceedingly aggravated and monstrous under which it was committed; because lord Ellenborough's act includes\* only cases of shooting or attempting to shoot, and stabbing, and cutting, the latter of which can only be applied to *sharp* weapons, and it was therefore deemed necessary to bring such cases as Howard's within the operation of lord Ellenborough's statute, an omission which this act remedies.

The eleventh and twelfth sections of the present act, are substituted for that part of lord Ellenborough's act, which related to the offences of stabbing, cutting, shooting, &c., with intent to murder, maim, disfigure, or disable any person, or with intent to resist or prevent the lawful apprehension of the party himself, or any of his accomplices: to which is added, *to wound* in any way, which, it is apprehended, will include weapons of all descriptions, whether they be sharp or blunt. If, however, this statute is acted upon to the letter, the consequences will be sweeping indeed: for every aggravated assault on a constable, when the man of authority gets a broken head, a circumstance of frequent occurrence in ale-house squabbles, will become a capital felony, not only on the person actually inflicting the blow, but on all present who may aid and abet the resistance, or the prevention of his lawful apprehension. In cases where several persons are indicted for assaulting a constable, it generally happens that only one or two actually struck the prosecutor, but that the rest were present and joining in the affray: and it is frequently a difficult matter for a jury to decide when a great number of persons have been assembled together, whether some of those who are indicted were actually engaged in resisting the constable, or merely lookers-on enjoying the row, or even taking the constable's part: this has always afforded a fair opportunity for a spiteful neighbour, and, it may be added too, for ill-natured justices of the peace, who are desirous of bringing their victim within the clutches of the law, to attempt the conviction of an innocent man: and there is little doubt that imprisonment is frequently awarded to those who have had no share in the breach of the peace. And under this statute, should blood be drawn, an indictment containing four or five counts, gravely stating, that A. B., the principal offender, with a certain weapon, to wit, an iron poker of the value of sixpence, inflicted severe wounds of the length of two inches, and depth of half an inch, first with intent to murder, then to maim, then to disfigure and disable, and lastly with intent to resist and prevent the lawful apprehension of the said A. B.; and further stating, that C. D. and a dozen others were present, counselling, aiding, abetting, comforting, assisting, and maintaining the said A. B., the *aforesaid* felony to do and commit: on which indictment if the jury are convinced that any of the persons were present, aiding, or abetting the principal offender in resisting his lawful apprehension, they cannot conscientiously do otherwise, than find such persons guilty of a crime which the law declares to be a capital felony. In cases of this kind, a line might with propriety be drawn between cases where there is express malice, and those where the law only implies malice, and that at least the jury might be enabled by their verdict to find all, or any of the defendants guilty of a misdemeanor only, so as to bring them within the operation of a subsequent section of the act, which makes a person assaulting with intent to resist or prevent the lawful apprehension or detention of the party assaulting, or of any other person, liable to imprisonment for two years, and to be fined.

At the suggestion of lord Tenterden a clause was inserted in the house of lords, which enables the jury on an indictment for an attempt to commit murder, except in cases of an attempt to poison, to find by their verdict, that by his own voluntary act, the principal desisted from carrying his purpose into full effect: in which case punishment of death should not be awarded, but the offender, his counsellors, aiders, and abettors, be deemed guilty of felony, and liable to two years' imprisonment: this provision was however rejected by the commons. The clause which relates to the offence of administering drugs, with intent to procure the mis-

\* 43 Geo. III, c. 58.

carriage of women, either quick, or not quick with child, is a simple re-enactment of the first two sections of lord Ellenborough's act in a more concise form : by it, when a mother was indicted for the murder of her bastard child, and was acquitted for the murder, the jury might still find that she was delivered of a bastard child and endeavoured to conceal its birth, for which she might be punished by two years' imprisonment. By the present act, a woman though acquitted of the murder, may still be found guilty under the same indictment for the concealment, or may be indicted at once for the concealment as a substantive offence, and punished as heretofore. There was an absurdity in indicting a person for murder, when the prosecutor might be satisfied from the evidence within his own reach, that the child had never been born alive. It is remarkable, that by the omission of the words, "which if born alive, would have been a bastard," married women may be indicted for concealing the birth of their legitimate children, or found guilty of concealment under an indictment for murder, whereas, before, if a married woman was acquitted of the murder, she could not have been found guilty of the concealment.

Considerable alterations are made in this act, with regard to the forcible abduction of women, with the view of gaining possession of their property.\* In order to make the offence complete, under the former statutes relating to this offence, a marriage must have taken place, and both the abduction and the marriage must have been in England. But by the present act, taking or detaining any woman who has, or expects to have, any real or personal property, from motives of lucre, *with intent* to marry or defile her, or cause her to be married or defiled by any other person, is felony, and the party is liable to transportation for life. The unlawful abduction from her parents or temporary guardian, of any girl under the age of sixteen, is punishable by fine and imprisonment; a clause called for by the aggravated case of Wakefield, who carried off Miss Turner from school. Some important alterations were made with respect to bigamy : as the law formerly stood, a person whose consort had been abroad for seven years, though known to be living, or if a divorce *a mensa et thoro* only had taken place, might marry again with impunity : by this act, ignorance of the above consort's being alive, is necessary to make such second marriage lawful.

The remaining sections of the act relate principally to assaults on different persons, either privileged from their office, or to whom public policy makes it necessary to give special protection, and to convictions before magistrates. It was enacted so far back as the reign of Edward III., that to arrest a clergyman, in a church, or churchyard, while attending divine service, subjected the party to imprisonment and ransom at the king's will, and to give satisfaction to the clergyman. The object which the legislature had in view, was to deter any one from interfering with the decent and reverent performance of public religious duties ; for it seems it was ineffectual as a protection to the clergyman himself, in as much as the arrest, if not made on a Sunday, was deemed good in law. Considering, however, that witnesses or other persons attending to give evidence, or otherwise connected with a cause in a court of law, are privileged from arrest, while going to, attending on, and returning from court ; it would seem that, by the modified protection granted to clergymen, engaged in the particular service of God, compared with that granted to those engaged in promoting the administration of justice, disrespect rather than reverence is shown to that holy service. Very few instances, except during the heat of the grand rebellion, of arrests attempted upon clergymen, while engaged in the performance of divine service, have ever occurred ;

\* 11 Hen. V., c. 22 ; 20 Eliz., c. 9 ; and 1 Geo. IV., c. 115.

but now, since lord Lansdowne's act has come into operation, instances of this offence will be more frequent, as it is only now a simple misdemeanor.

The statute \* which made it a capital felony to assault, strike, or wound a privy counsellor, in the execution of his office, is re-enacted. This act introduces an important alteration in the administration of justice, with respect to assaults, and it will be a considerable benefit to the public; that prosecutions for trifling assaults, in which the prosecutor is frequently as guilty as the defendant, be banished from the courts of quarter sessions, though the change adds to the already exorbitant powers of justices of the peace: scarcely a fiftieth part of assault cases that come before magistrates in their private houses, were ever brought before a court: in many instances, the quarrel was settled before the sessions; in others, the magistrates bound over the offender to keep the peace, and dismissed the complaint; and in those only where the intervention of a jury was absolutely requisite, or where the private resentment of the magistrate, or of an influential neighbour, called for a public exposure, were the most extreme measures resorted to. †

The act itself commences with expressing the expediency of repealing various statutes then in force, in that part of the united kingdom called England, relative to offences against the person, for the purpose of amending and consolidating their provisions into one act: it therefore repeals, either partially or entirely, all the acts in the statute book relating to offences against the person, from the 9 Henry III., c. 25, to the 3 George IV., c. 114. II. Petit treason, in both principals and accessories, shall be deemed no greater offence than murder, and to be dealt with accordingly. III. Murderers and accessories, before the fact, shall suffer death as felons; accessories, after the fact, to be transported for life, or imprisoned, with or without hard labour, not exceeding four years. IV. Murderers shall be executed on the day next but one, after that on which the sentence shall be passed, unless it happen to be a Sunday, and in that case on the Monday following, and their bodies either to be dissected or hung in chains, at the discretion of the court. V. When the court orders dissection, and if the murderer is to be executed within Middlesex, or the city of London, his body is immediately to be conveyed, by the sheriff or his officers, to the surgeons' hall, or wherever the surgeons' company shall appoint, for dissection; and if executed elsewhere, the murderer's body shall be delivered to such surgeon, for dissection, as the court shall appoint. VI. After judgment, every murderer shall be confined, in some safe place within the prison, apart from all other prisoners, and fed with bread and water only, and with no other food, or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which the surgeon of the prison may order other necessaries to be administered; and no person, but the gaoler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission, in writing, of the judge who tried him, or the sheriff, or his deputy; provided, that in the case of a respite, the judge, in writing, may relax all these restraints and regulations, during the period of the respite. VII. British subjects charged, in England, with any murder committed out of the kingdom, either as principals, or as accessories, either before, or after the fact; any justice of the peace of the county or place, where the parties so charged shall be, may take cognizance of the offence, and proceed as if the murder had been committed within the limits of his ordinary jurisdiction: persons entitled to the privilege of peerage, guilty as aforesaid, shall be tried by their peers. VIII. In the event of any person dying in England, who shall have been feloniously stricken, poisoned, or otherwise hurt upon sea, or at any place out of England, or dying out

\* 5 Anne, c. 16. † *Law Magazine or Quarterly Review of Jurisprudence* for 1838, Vol. I. p. 139.

of England, who had been feloniously stricken, or poisoned, &c., in England, or upon the sea, every such offence, whether it amount to murder, or manslaughter, or to being accessory, before, or after the fact, may be dealt with, inquired of, tried, determined, and punished in the county or place in England, where the death from such causes shall happen.

IX. Every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported for life, or for fourteen years, or to be imprisoned, with or without hard labour, for four years.

X. No punishment, or forfeiture, shall, however, be incurred by any person who shall kill another by misfortune, or in his own defence, or in any manner without felony.

XI. If any person, unlawfully, and maliciously, shall either administer, or attempt to administer, to any person, or cause the same to be taken by any person, any poison, or other destructive thing, or shall unlawfully, and maliciously attempt to drown, suffocate, or strangle any person, or shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person, with intent, in any of these cases, to murder such person; any such offender, with all counsellors, aiders, or abettors, shall be guilty of felony, and shall suffer death.

XII. If any person shall, unlawfully and maliciously, shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any loaded arms at any person, or to stab, cut, or wound any person, with intent, in either case, to maim, disfigure, or disable such person, or do him some other grievous bodily harm, or with intent to resist, or prevent the offending party's lawful apprehension, or detain, or that of any of his accomplices, any such offender, with all his counsellors, aiders, or abettors, shall be guilty of felony, and suffer death accordingly; provided, however, that if it appear on the trial that, if death had ensued in consequence of any of these offences, the same would not have amounted to the crime of murder, he shall be acquitted of felony.

XIII. If any person, with intent to procure the miscarriage of any woman, then being quick with child, shall unlawfully and maliciously administer to her, or cause her to take any poison or other noxious thing, or shall use any instrument, or other means whatever, with the like intent, every offender, with their counsellors, aiders, or abettors shall be guilty of felony, and suffer death as a felon: and any person guilty, as above, of administering poison, &c., to a woman who is not quick with child, with the counsellors, &c., are guilty of felony, and shall be transported for fourteen years, or be imprisoned, with or without hard labour, for three years, and if a male, to be whipped three times.

XIV. If any woman is delivered of a child, and by secret burying, or otherwise disposing of the dead body, shall endeavour to conceal its birth, she shall be guilty of a misdemeanor, and liable to be imprisoned, with or without hard labour, for two years; and it shall not be necessary to prove whether the child died before, at, or after the birth; provided that, if the mother is acquitted of the murder of her child, and, in case it appears in evidence, the jury shall find that she was delivered of a child, and that she endeavoured, by secret burying, or otherwise, to conceal its birth; and, on conviction, the court may pass such sentence, as if she had been indicted for concealment.

XV. Every person convicted of the abominable crime of sodomy, committed either with mankind or any other animal, shall suffer death as a felon.

XVI. Every person convicted of the crime of rape, shall suffer death as a felon.

XVII. If any person carnally know and abuse any girl under ten years of age, he shall be guilty of felony, and suffer death as a felon: and if any person carnally know and abuse a girl above ten, and under twelve years of age, he shall be guilty of a misdemeanor, and liable to imprisonment, with or without hard labour, for such term as the court shall award.

XVIII. And, whereas, on trials for the crimes of sodomy and rape, and of carnally abusing girls under the ages before mentioned, offenders frequently escape on account of the difficulty of the proof which has been required of the completion of these several crimes; for remedy, it is now enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed, in order to constitute a carnal knowledge, but that it shall be deemed complete upon proof of penetration only.

XIX. If any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin, to any one having such interest; and if any person, for motives of lucre, take away, or detain such woman, against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, such offender, with his

counsellors, aiders, and abettors, shall be guilty of felony, and liable to transportation for life, or to imprisonment, with or without hard labour, for any term not exceeding four years.

XX. Any person unlawfully taking, or causing to be taken, any unmarried girl, under the age of sixteen years, out of the possession, or against the will of her father, or mother, or of any other person having the lawful care or charge of her, he shall be guilty of a misdemeanor, and liable to suffer such punishment, by fine, or imprisonment, or both, as the court shall award.

XXI. Any person, maliciously, either by force or fraud, leading, taking, decoying, enticing away, or detaining any child, under the age of ten years, with intent to deprive the parents, or any other person having lawful charge, or possession of such child, or with intent to steal any article upon, or about the person of such child, to whomsoever the article may belong; or if any person, with the aforesaid intention, shall receive, or harbour any child, knowing the same to have been led, taken, decoyed, or enticed away, or detained by force or fraud, and all the counsellors, aiders, or abettors, shall be guilty of felony, and liable to be transported for seven years, or to be imprisoned, with or without hard labour, for two years, and if a male, to be whipped: but this act does not extend to the father of an illegitimate child, or having any right to the possession of such child, taking such child out of the possession of the mother.

XXII. If any married person shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in England, or elsewhere, the offender, and the counsellors, &c., are guilty of felony, and liable to transportation for seven years, or to imprisonment, with or without hard labour, for two years; and the offence may be dealt with, tried, &c., in the county where the offender shall be apprehended: provided always, that nothing herein contained shall extend to any second marriage contracted out of England, by any other than a subject of his majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time, or shall extend to any person, who at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

XXIII. To arrest a clergyman upon any civil process while he is performing divine service, or knowing that he is either going to, or returning from the performance of divine service, is a misdemeanor, to be punished by fine or imprisonment, or both.

XXIV. To assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorized on account of the exercise of his duty in, or concerning the preservation of any vessel in distress, or of any vessel, goods or effects, wrecked, stranded, or cast on shore, or lying under water, subjects the offender to seven years' transportation, or imprisonment, with or without hard labour, for such term as the court shall award.

XXV. When any person shall be charged with, and convicted of, any of the following offences as misdemeanors:—of assault with intent to commit felony; of assault upon any peace officer, or revenue officer in the due execution of his duty, or any of his assistants; or of an assault with intent to resist, or prevent the lawful apprehension, &c., of any criminal; or of an assault in pursuance of any conspiracy to raise the rate of wages; in any such cases, the court may sentence the offender to be imprisoned, with or without hard labour, for any term not exceeding two years, and may also, if the court thinks fit, fine, and require sureties to keep the peace from the offender.

XXVI. Any person unlawfully and forcibly hindering any seaman, keelman, or coaster, from working at, or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to any person, with the intention to deter or hinder him from selling or buying any wheat or other grain, flour, meal or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of grain, &c., whilst on its way to, or from any city, market town, or other place, with intent to stop the conveyance of the same; on conviction before two justices of the peace, such offender shall be imprisoned, and kept to hard labour, for any term not exceeding three calendar months.

XXVII. In order that a summary power for punishing persons for common assaults and batteries be provided, it is enacted, that where any person shall unlawfully assault, or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine the offence, and the offender on conviction shall forfeit, and pay such fine as shall appear to them to be meet, not ex-

ceeding with costs, the sum of five pounds, to be paid to the overseers of the poor. And if the fine with costs, shall not be immediately paid, the offender shall be committed, for any term not exceeding two calendar months, unless the fine and costs be sooner paid: but if the justices shall deem the assault, &c., not to be proved, or to have been justified, or of so trifling a nature as not to merit any punishment, and shall dismiss the complaint accordingly, they shall forthwith deliver a certificate under their hands to the alleged offender, stating the fact of such dismissal. XXVIII. Such certificate or conviction, shall bar all other proceedings, civil or criminal, for the same cause. XXIX. But whenever the justices shall find such assault or battery to have been accompanied by any attempt to commit felony, or shall be of opinion, that the offence is a fit subject for a prosecution, by indictment, they shall abstain from any adjudication thereon, but deal with the case in the same manner as before the passing of this act. Justices of the peace are not authorized by this act, to hear and determine any case of assault or robbery, where any question shall arise as to the title to any lands, tenements, or hereditaments, or to any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. XXX. If any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his majesty's colonies, or elsewhere, or refuse to bring home with him again, all such of the men as he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward bound voyage, he shall be guilty of a misdemeanor, and on conviction, shall be imprisoned for such term as the court shall award; such offences may be prosecuted by indictment, or by information at the suit of the attorney-general, in the court of king's bench, and it may be alleged in the indictment, or information, to have been committed at Westminster, in the county of Middlesex: and this act authorizes the court to issue one or more commissions, if necessary, for the examination of witnesses abroad, whose depositions shall be received in evidence. XXXI. Every accessory before the fact, to any of the felonies punishable under this act, for whom no punishment has been herein before provided, shall be liable at the discretion of the court, to be transported for fourteen years, or to be imprisoned, with or without hard labour, for three years, and every accessory after the fact, shall be liable to imprisonment, except in cases of murder, with or without hard labour, for two years: and counsellors, aiders, and abettors, in any misdemeanor, are liable to be punished as principal offenders. XXXII. All the indictable offences mentioned in this act, which shall be committed within the jurisdiction of the admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England, and may be dealt with, inquired of, tried, and determined in the same manner as any other offences committed within the same jurisdiction, but nothing herein contained, shall alter, or affect any of his majesty's land or naval forces. XXXIII. And, for the more effectual prosecution of offences punishable upon summary conviction, by virtue of this act, be it enacted, that where any person shall be charged on the oath of a credible witness before any justice of the peace, with any such offence, he may summon the offender to appear before any two justices of the peace, at a time and place to be named in the summons, and if he shall not appear accordingly, then the justices may either proceed to hear, and determine the case *ex parte*, or may issue their warrant for his apprehension, and bringing him before them, or the justice if he thinks fit, may issue his warrant in the first instance, without any summons. XXXIV. The punishment of any offence, punishable on summary conviction, by virtue of this act, shall be commenced within three calendar months after the commission of the offence, and not otherwise. XXXV. Contains the form of conviction. XXXVI. No conviction shall be quashed for want of form, or be removed, by *certiorari* or otherwise, into any of his majesty's superior courts of record; and no warrant of commitments shall be held void by reason of any defect therein, provided that it be therein alleged, that the party has been convicted, and that by a good and valid conviction to sustain the same. XXXVII. None of the provisions of this act, shall affect or alter any act, so far as it relates to the crime of high treason, or to any branch of the public revenue, or any act for the prevention of smuggling, or any part of the act passed in the sixth year of



this reign, entitled, "an act to repeal the laws relating to the combination of workmen, and to make other provisions in lieu thereof." XXXVIII. And finally, nothing in this act shall extend to either Scotland or Ireland.\*

On the 27th June, 1828, an act was passed for amending the law of evidence, in the case of the Quakers or Friends, and the Moravians or *Unitas Fratrum*, whose members have always refused to take oaths, mistaking our Saviour's injunction against *profane swearing*, as if prohibiting oaths before magistrates, "for confirmation, and as an end of strife," which never could be his meaning, as he himself took an oath before Pilate, when he was "adjured by the living God," when he answered immediately, and to the point, although he had been silent before to their interrogatories. An oath is either an affirmation or a denial of any thing, before one or more persons, who have authority to administer it, for the discovery and advancement of truth and right, calling GOD to witness that the testimony is true: it is therefore called *sacramentum*, a holy bond or tie: it is in law called a *corporal oath*, because when the witness swears, he lays his right hand on the holy evangelists, or New Testament. There are several sorts of oaths in the English law, viz, *juramentum promissionis*, where oath is made either to do, or not to do such a thing; *juramentum purgationis*, when a person is charged with any matter by bill in chancery, &c.; *juramentum probationis*, where any one is produced as a witness to prove or disprove any thing; and *juramentum triationis*, when persons are sworn to try an issue, &c. All oaths must be lawful, and allowed by the common law, or by some statute; if they are administered by persons in a private capacity, or not duly authorized, they are *coram non judice*, and void: and the administrators are guilty of a high contempt, for doing it without lawful warrant, and punishable by fine and imprisonment. Formerly, one who was to testify on behalf of a felon, or person indicted of treason, or other capital offence, upon an indictment at the king's suit, could not be examined on his oath for the prisoner and against the king, though he might be examined without oath; but now witnesses on behalf of the prisoner† upon indictment are to be sworn to depose the truth, in the same manner as witnesses for the king; and if convicted of wilful perjury, shall suffer the punishment inflicted for such offences. The evidence for the defendant in an appeal, whether capital or not, or on indictment or information for a misdemeanor, before this statute, was to be on oath. A witness in any cause may have two oaths given him, one to speak the truth to such things as the court shall ask concerning himself, or other things which are not evidence in the cause; the other to give testimony in the cause in which he is produced as a witness. If oath be made against oath in a cause, it is *non liquet* to the court, that is, it is uncertain to the court which of their oaths is the true one: and in which case the court will assume the truth of that oath

\* 9 Geo. IV. c. 31.

† 1 Anne, II., 9.

which is to affirm the verdict, judgment, &c., as it tends to the expediting of justice. A voluntary oath by the consent and agreement of the parties themselves is lawful, as well as a compulsory oath by a magistrate, and in such case, if it is for the performance of a spiritual thing, the party failing is suable in the ecclesiastical court, *pro lésione fidei*; if a temporal thing, the party failing may be punished in *Banco Regis*, i. e. the king's bench.

By the common law, officers of justice are bound to take an oath for the due execution of justice. Though, if the promissory oaths of officers are broken, they are not punishable as perjuries, like the breaches of assertory oaths; but their offences ought to be punished with a severe fine. At the end of a legal oath, it was anciently added, "*So help me God at his holy dome,*" or judgment; and our ancestors believed that a man could not be so wicked as to call God to witness any thing which was not true, but that if any one should be perjured, he must continually expect that God would be the revenger: and probably from that opinion the *purgations* of criminals by their own oaths, and for great offences, by the oaths of others, were allowed. All official people under the government, peers, and members of the house of commons, ecclesiastical persons, members of colleges, schoolmasters, preachers, sergeants at law, counsellors, attorneys, solicitors, advocates, proctors, &c.—are enjoined to take the oath of allegiance: and persons neglecting or refusing, are declared incapable of executing their offices and employments, disabled to sue in law and equity, to be guardian, executor, &c., or to receive any legacy or deed of gift, to be in any office, &c., and besides to forfeit five hundred pounds; but this does not extend to constables, and other parish officers, nor to bailiffs of manors. Ecclesiastical persons are required to take the oath of supremacy, a neglect or refusal of which, renders them liable to the pains and penalties of a *præmunire*. As administered for upwards of six hundred years, the oath of allegiance contained a promise, "to be true and faithful to the king and his heirs, and truth and faith to bear of life, and limb, and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which Sir Matthew Hale remarks, that it was short and plain, not entangled with long and intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But at the Revolution, the terms of this oath were changed, and the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising in general terms, "that he will be faithful, and bear true allegiance to the king," without mentioning his "heirs," or his own title *de jure*, or specifying in the least wherein that allegiance consists. The oath of *supremacy*, is principally calculated as a renunciation of the pope's pretended and usurped authority; and the oath of *abjuration*, as introduced in the reign of William of Orange, and afterwards regulated by

George III., very amply supplies the loose and general texture of the oath of allegiance: it recognises his majesty's title derived under the act of settlement; it engages to support him to the utmost of the juror's power, promises to disclose all traitorous conspiracies against him; and expressly renounces any claim of the descendants of the illustrious house of Stewart, in the direct line, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in office, trust, or employment; and may be tendered by two justices of the peace, to any person whom they shall suspect of disaffection. The oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens. Persons of eighteen years of age, refusing to take the new oaths of allegiance, being tendered by the proper magistrate, are subject to the penalties of a *præmunire*: and all sergeants, counsellors, proctors, attorneys, and all officers of court practising without having taken the oath of allegiance, are guilty of a *præmunire*, whether the oaths have been tendered to them or not. Oaths must be taken in the very words prescribed in the acts, and cannot be qualified; but Quakers and Moravians have, on account of their religious opinions, been excused from taking those oaths which have been justly imposed on all others, his majesty's subjects, in all ages: and on making and subscribing the declaration of fidelity, were not liable to the penalties enforced against others who refused to take the oaths: but on neglecting or refusing to subscribe the declaration of fidelity, they were disabled from voting at the election of members of parliament. When an oath is required, Quakers are permitted to make a solemn affirmation or declaration, declaring in the presence of God, the witness of the truth, &c., which is a piece of solemn mockery, for an affirmation in the presence of God is an oath, let them qualify it in any way they like. But they are incapable of giving evidence in a criminal cause, serving on juries, or bearing any office in the government, unless they are sworn like other protestants; on the affirmation of a Quaker, the court will not grant an attachment for non-performance of an award, nor security for the peace, nor a rule for an information. But a rule to show cause why an appointment of overseers should not be quashed, being served by a Quaker, was made absolute on his affirmation, this not being considered as a criminal prosecution, though on the crown side, and the rule in the king's name.\* An affirmation was allowed in all cases, (except criminal,) where by any act of parliament an oath is required, though no provision be therein made for admitting a Quaker to make his affirmation. A Quaker who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a corporation as well as any other person, and his solemn affirmation is equivalent to taking the usual oaths.† That

\* By stat. 22 Geo. II. c. 46.

† 7 & 8 Will. III. c. 34.

clause of the statute which provides that no Quaker, by virtue of that act, shall have any office or place of profit in the government, does not extend to the freedom of a corporation.\*

It being deemed expedient, therefore, by the legislature, that Quakers and Moravians should be allowed to give their evidence, upon their solemn affirmation, in all criminal, as well as civil cases; and that in prosecutions for forgery, the party interested should be rendered a competent witness; it was accordingly enacted—

That whenever the members of either of these two sects should be required to give evidence, in any case whatsoever, criminal or civil, they shall, instead of taking the oath in the usual form, be permitted to make their solemn affirmation or declaration, in the following words:—"I, A. B., do solemnly, sincerely, and truly, declare and affirm," which affirmation or declaration shall be of the same force and effect in all courts of justice or other places, where, by law, an oath is required, as if they had taken an oath in the usual form; and on conviction of having wilfully, falsely, and corruptly affirmed or declared any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, such offender shall be subject to the same pains, penalties, and forfeitures, as other persons convicted of wilful and corrupt perjury are subject to. On any prosecution by indictment or information, either by common or statute law, against any person for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of them, knowing them to be forged; or for being accessory, either before or after the fact, or for aiding, abetting, or counselling the commission of any such offence; if the same be a misdemeanor, the party whose name has been forged shall be deemed a competent witness in support of any such prosecution, notwithstanding his actual or supposed interest in the article forged. It being expedient to remove all doubts respecting the civil rights of persons convicted of felonies, not capital, who have undergone the punishment to which they were adjudged, it is now enacted that when the offender shall be convicted of any felony, not punishable with death, and shall endure the punishment to which he is sentenced; such punishment shall have the same effects and consequences as a pardon under the great seal, as far as regards the felony of which he was convicted: but this privilege does not extend to the prevention or mitigation of any punishment or conviction for any future and distinct felony. This act further restores the competency of such offenders as were formerly rendered incapable of giving evidence, after conviction for certain misdemeanors; so that now, nothing but perjury or subornation of perjury, can render any party an incompetent witness, after he has undergone his punishment.†

The laws of England have been the established laws of Ireland, ever since the reign of king John, who, in the twelfth year of his reign, went over into Ireland, and carried along with him many able sages of the law, and then, by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England; but at the time of its conquest by Henry II. the Irish were governed by what they denominated the Brehon law, which was so called from the title of their judges, who were styled *Brehons*:‡ but for more particular information we must refer to our notice of Ireland generally. As the operation of the acts for making such changes on the fundamental laws of England were excepted as to Ireland, it was therefore necessary to pass acts regulating the laws in that kingdom, and placing

\* Tomlin's Law Dictionary. † 9 Geo. IV. c. 32. ‡ Tomlin's Law Dictionary.

them on a similar footing, or as nearly so as the natural disposition and circumstances of the people would admit of. In consequence, an act passed through the legislature and received the king's sanction on the 15th July, 1828, for amending the laws in force in Ireland, relating to the punishment of felony, and to bail in cases of felony, and to examinations, informations, and other proceedings, previous to trial for criminal offences, and to larceny and other offences of stealing, and to burglary, robbery, and threats for the purpose of robbery or extortion, and to the embezzlement of property, and to the obtaining of property by false pretences, and to the receipt of stolen property, and to malicious injuries to property, and the benefit of clergy, and for repealing all the acts relating to them, in the Irish and British parliament, from the 9 Henry III. to the 7 and 8 George IV. c. 32,\* and at same time, an act was passed for improving the administration of criminal justice in Ireland, defining under what circumstances persons in that kingdom may be admitted to bail in cases of felony: and making better provisions for taking examinations, informations, bailments, recognizances, and returning the same to the proper tribunals, retaining, in some instances, the technical strictures of criminal proceedings, so as to insure the punishment of the guilty without depriving the accused of any just means of defence; abolishing the benefit of clergy, and some matters of form which impeded the due administration of justice; and making better provisions for the offenders in certain cases.† Also, an act for consolidating and amending the laws in Ireland, relative to larceny and other offences connected therewith, and placing them on the same footing as in England.‡ At the same time, the law respecting malicious injuries to property, whose operation was at first confined to England, was, with some modifications, extended to Ireland.§

We are now arrived at that period of our legal history which was denominated by Sir Robert Peel, "a breaking in upon the Constitution of 1688:" but previous to reciting the "act for the relief of his majesty's Roman catholic subjects," which, by the king's consent and authority, became law on the 13th April, 1829, and which entirely changed the religious character of the British government, that the wisdom of our ancestors, at the Revolution, had determined should be for ever protestant,—we will take a short review of the laws affecting the Roman catholic subjects of Great Britain.

"As to papists," says judge Blackstone, "what has been said of the protestant dissenters, would hold equally strong for a toleration of them; provided their separation was founded only upon difference of opinion in religion; and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their

\* 9 Geo. IV. c. 53. † 9 Geo. IV. c. 54. ‡ 9 Geo. IV. c. 55. § 9 Geo. IV. c. 56.

purgatory, and their auricular confession, their worship of relics and images, nay, even their transubstantiation. But while they acknowledge a *foreign power, superior* to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.”\*

By various statutes, if any *English* priest of the church of Rome, born in the dominions of the crown of England, came to England from beyond the seas, or tarried in England three days without conforming to the established church, he was guilty of high treason; and they likewise incurred the same guilt, if they were reconciled to the see of Rome, or procured the reconciliation of others. They were totally disabled from giving their children any education in their own religion. If they educated their children at home, for maintaining the schoolmaster, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit 10*l.* per month, and the schoolmaster to forfeit 40*s.* per day: if they sent their children to any school of their own persuasion abroad, they were liable to forfeit 100*l.* and the children so sent, were disabled from inheriting, purchasing, or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money. Saying mass was punishable by a forfeiture of 200 marks, and hearing it, by 100 marks.

Till the 35th year of the reign of Elizabeth all non-conformists were considered as recusants, and were all equally subject to the penalties. In that year the first penal statute was made against popish recusants, by that name, and as distinguished from other recusants, and which gave rise to the distinction between protestant and popish recusants; but the act of toleration relieved the protestant dissenters from all the penalties of recusancy.† From that statute also arose the distinction between papists or persons professing the popish religion in general, popish recusants, and popish recusants convict. Notwithstanding the frequent mention in the statutes of papists, neither the statutes themselves nor the cases adjudged upon them, present a clear notion of the acts or circumstances that, in the eye of the law, constituted a papist. When a person of that description absented himself from church, he came under the legal description of a popish recusant; when he was convicted in a court of law, of absenting himself from church, he was termed a popish recusant convict: to this must be added the constructive recusancy, incurred by a refusal to take the oath of supremacy. By the statutes against recusancy, popish recusants convict were punishable by the censures of the church, and by a fine of 20*l.* for every month during which they absented themselves from church: they were disabled from holding offices or employments: from keeping arms in their houses: from maintaining actions or suits at law or in equity: from being executors or

\* Comm. B. IV. c. 4.

† 35 Eliz. c. 2.

guardians : from presenting to advowsons : from practising in law or physic : from holding offices, civil or military : they were subject to the penalties attending excommunications : were not permitted to travel five miles from home, unless by license, on pain of forfeiting all their goods : and might not appear at court, under a penalty of 100*l*. A married woman, when convicted of recusancy, was liable to forfeit two-thirds of her dower or jointure : she could not be an executrix or administratrix to her husband, nor have any part of his goods ; and, during her marriage, she might be kept in prison, unless her husband redeemed her, at the rate of 10*l*. per month, or the third part of his lands. Popish recusants convict, were, within three months after conviction, either to submit, and renounce their religious opinions, or if required by four justices, to abjure the realm : and if they did not depart, or if they returned without license, they were guilty of felony, and suffered death as felons.

It must be premised, that the Roman catholics made no objections to the oath of allegiance, or the oath of abjuration.\* By the statute of Elizabeth,† the persons mentioned in it were compellable to take the oath of supremacy contained in that act : that oath, with the oaths of allegiance and obedience, were repealed after the Revolution, and new oaths of supremacy and allegiance were prescribed to be taken in their stead.‡ By the oath of supremacy, persons are made to swear, that “ no foreign prince, person, prelate, state, or potentate, hath, or ought to have any jurisdiction, power, supremacy, pre-eminence, or authority, ecclesiastical or spiritual, within the realm.” It might be tendered to any person, by any two justices of the peace ; and persons refusing the oath so tendered, were adjudged to be popish recusants convict, to be proceeded against, and to forfeit as such : this was called constructive recusancy. It was not the offence of recusancy itself, which, as already observed, consisted in the party absenting himself from church ; it was the offence of not taking the oaths of supremacy, and the other prescribed oaths, the refusal of which, was placed on the same footing as a legal conviction on the statutes of recusancy, and subjected the refusing party to the penalties of those statutes. This was the most severe of all the laws against the papists. The punishment of recusancy was penal in the extreme ; and persons objecting to the oath in question, might be subjected to all the penalties of recusancy, merely by refusing the oath when tendered to them. It added to the penal nature of these laws, that the oath in question might be tendered, at the mere will of two justices of the peace, without any previous information or complaint before a magistrate, or any other person. By refusing the oath of supremacy, when tendered, they were restrained from practising the law as advocates, barristers, solicitors, attorneys, notaries, or proctors ; and from voting at

\* 1 Geo. I., c. 13.—6 Geo. III., c. 53. † 1 Eliz., c. 3. ‡ 3 James I., c. 4.

elections. All members of either house of parliament were required \* before taking their seats, to make the declaration against popery, by which they declared their disbelief of the doctrine of transubstantiation, and their belief that the invocation of saints, and the sacrifice of the mass, are idolatrous. After the Revolution, it was enacted, † that a person educated in the popish religion, or professing the same, who did not in six months after the age of sixteen take the oaths of allegiance and supremacy, and subscribe the declaration against transubstantiation, &c., should, in respect of himself only, but not of his heirs or posterity, be disabled to inherit, or take any lands by descent, devise, or limitation, in possession, reversion, or remainder; and that, during his life, till he took the oaths and subscribed the declaration against popery, his next of kin, who was a protestant, should enjoy the lands, without accounting for the profits; and he should be incapable of purchasing; and that all estates, terms, interest, or profits out of lands, made, done or suffered to his use, or in trust for him, should be void. Papists were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, papists of the age of eighteen years, and not having taken the oaths of allegiance and supremacy, were subjected to the burden of the double land tax. They were required to register their names and estates in the manner there directed, ‡ and under penalties, and by several subsequent statutes, an obligation of inrolling their deeds and wills, was imposed on them. § Such, at the accession of the house of Brunswick, were the penal laws against Roman catholics.

The above brief summary of the laws against papists, is cited from the publication of a Roman catholic, and in consequence, we have taken it in preference to that by judge Blackstone, with which, however, it does not exactly agree. These laws, however, were seldom exerted to their utmost rigour. They are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved of as a standing system of law. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the reformed religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the government and parliament to counteract so dangerous a spirit by laws of great, and, at that time, of necessary severity. The gunpowder treason in the succeeding reign, struck a panic into James I. and the whole nation, which operated in different ways: it occasioned the enacting of new laws against the papists, but his natural clemency and goodness of heart, prevented him from putting them in execution. The guilty intrigues of the papists, and

\* 30 Char. II., c. 2.

† 1 Geo. I., c. 55.

‡ 11 & 12 Will. III., c. 4.

§ Tomlin's Law Dic., art. Papists.



their horrid massacre of upwards of an hundred and fifty-four thousand protestants in cold blood, in Ireland, in the reign of Charles I., the prospect of a popish successor to the crown, in that of Charles II., the assassination plot in the reign of king William, and the avowed claim of the true heir, in the right line of the house of Stewart, who was a Roman catholic in that and the subsequent reign, will account for the extension of these penalties, at those several periods of our history.

The most effectual relief was afforded to the members\* of the Latin church in these kingdoms, and many of the restrictions and penalties above enumerated, were removed from those who were willing to comply with the requisitions of that statute, which are—

That they must appear at some of the courts at Westminster, or at the quarter sessions, held for the county, city, or place where they reside, and there make and subscribe a declaration, that they profess the Roman catholic religion, and also an oath, the substance of which is, that they duly take the oath of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing and murdering princes excommunicated by the see of Rome;† in respect of them, the statute is repealed so far only as it disables them from purchasing, or inheriting, or authorizes the apprehension or prosecution of the popish clergy, or subjects either them or any teachers of youth to perpetual imprisonment. The officer of court was obliged to give a certificate to every Roman catholic who duly took the oath, and transmit a list to the privy council, of all persons who had thus qualified themselves within the year, in his respective county. The statute then provided, that a Roman catholic thus qualified, should not be prosecuted under any statute, for not repairing to a parish church, nor prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship, until it was certified to the sessions; nor could any minister officiate in it, until his name and description were recorded there: and they were also prohibited from having their doors locked or barred during the time of meeting or divine worship. If any Romanist was elected constable, churchwarden, overseer, or into any parochial office, he might have executed the same by deputy, to be approved, as if he were to act for himself as principal. Every minister who qualified, was exempt from serving on juries, or from being elected to any parochial office. Any person who disturbed their congregations was bound over to the next sessions, and on conviction forfeited twenty pounds. But Roman catholic clergy were prohibited from officiating in any place of worship having a steeple and a bell, or at any funeral in a churchyard, or from wearing the habits of his order, except in places allowed by the statute, or in a private house, where there were not more than five persons, besides the family. They were not exempted from the payment of tithes, or other dues to the church, nor were the statutes concerning marriages affected by this statute, nor any law respecting the succession to the crown. No religious order was allowed to be established, and every endowment of schools or colleges by a Romanist, still continued to be considered superstitious and unlawful. They were not to be summoned to take the oath of supremacy, nor the declaration against transubstantiation. Neither when qualified, were they removable from London and Westminster: qualified peers were not punishable for coming into the palace of the king or queen: no papists whatever were any longer obliged to register their names and estates, or enroll their deeds and wills: and any one who had qualified was permitted to act as a barrister, attorney, and notary.

The Irish parliament passed various statutes for the relief of the papists in that kingdom, the last and most effectual of which,‡ enacted—

\* 31 Geo. III. c. 32.

† 11 & 12 Will. III.

‡ 33 Geo. III. c. 21.

That no subject being a papist, or married to one, or educating his children as such, taking the oaths required, should be liable to any penalty or disability, or to any law for limiting, charging, or discovering their estates, or touching the acquiring of property, or securities affecting it, save such as protestants are liable to: and all such parts of oaths required to be taken at voting, or to qualify for voting for members of parliament, as deny the so being a papist, should not be required to be taken by any voter, neither were they required before voting, to take the oaths of allegiance and abjuration. On taking the oaths, and an additional oath required by this act, papists might hold, exercise, and enjoy *all* civil and military offices, or places of trust and profit, under his majesty in Ireland, and any office or place of trust, and be members of any *lay* corporation, without taking the oaths, &c., with certain exceptions.

Afterwards an academy was established by act of parliament,\* at Maynooth, for their education, and has been ever since supported by annual grants of money from parliament. By which it appears, that of late years, previous to the year 1829, the members of the Roman catholic church enjoyed as full and free a religious toleration, as any protestant communion whatever, with which however they were not satisfied, but were desirous of being admitted to seats in parliament, to legislate for protestant churches, which they consider as heretics, and to possess those places of trust and emolument from which the British and Irish parliaments had expressly excluded them; the arguments which they themselves and their advocates advanced, were, that the character of popery was now entirely changed, that they had abjured those principles with which they had been accused, of not keeping faith with heretics: of putting sovereign princes, excommunicated by the pope, to death: of bearing any faith or allegiance to the pope inconsistent with their duty to their protestant sovereign: of any desire to overturn the established churches of England, Ireland, or of Scotland: but that their chief desire was to live in the utmost charity and brotherly love with their protestant brethren. That it would be an additional bond of union and strength to the empire, and relieve the nation from the burden of so large a standing army in time of peace, as the disturbed and discontented state of Ireland required, which discontent being fostered and kept alive by a feeling of religious inferiority, the repeal of the few remaining disabilities would entirely remove and obliterate. That this emancipation was not sought for in a religious point of view, but in a political: that if the bill passed, the Romanists will be more likely to be converted to protestantism than they are at present.

On the other side it was argued by the opponents of the measure, that religion embraced the *whole* of the question; that it is a violation of the coronation oath, which requires the king to do his *utmost* to maintain the legally established protestant religion: that if the admission into parliament were a question merely of civil polity, it would still be unjust to give to the subjects of a foreign power, who are only half subjects of the king, and therefore not our *fellow subjects*, equal political privileges with their pro-

\* 35 Geo. III., c. 21.

testant fellow countrymen. That protestants and papists can never be fellow subjects in this our protestant country. Though they may be nominally united in office, they must ever be divided in principle, and by many irreconcilable interests: that it was a breaking in upon the constitution: that it was once our boast and our happiness, and the ground of our prosperity, that the law of England was, in its foundation and its practice, eminently in accordance with the law of God. We have been accustomed to say, "what nation is there so great, that hath God so nigh unto them, as the Lord our God is in all things that we pray unto him for?" But if popery be admitted into the constitution of England and papists into her highest councils, by such advancement of popery, and union with her idolatry, we recognize the worship, not of one God, but of many, not of one Saviour, but of many: that we interfere not with the worship of the Romanists, they are as secure as ourselves in life, limb, property, and religion, and we only refuse the *political power* of injuring ourselves, and of assailing our worship, to a band of theologians, who declare us to be pestilent heretics, and who are bound to extirpate our faith: that his majesty's right to the crown, resting solely on the act of settlement, which itself rests on the revolution of 1688, and which was on essentially protestant principles, destroys the very foundation of his title; "and now," says Faber, in bitter sarcasm, "all this process must clearly strengthen, in a most marvellous degree, the acquired rights of the house of Brunswick, and must for ever put an extinguisher upon the hopes of every descendant of king Charles I. Surrounded by his faithful papists, who will religiously use their political power solely to maintain a protestant king against a popish claimant, and solely to uphold a notorious protestant heresy against the undoubted mother and mistress of all churches; what can his gracious majesty have to fear? As the parliament of old used to tell king Charles I. with abundant sincerity, they will indisputably make him the most glorious monarch that ever sat on the throne of England!" "A glance," said Mr Croly, "at the British history, since the Reformation, must show that every reign which attempted to bring back popery, or even to give it that share of power which could in any degree prejudice protestantism, has been marked by signal misfortune. It is a striking circumstance that almost every reign of this popish tendency has been followed by one purely protestant; and as if to make the source of the national peril plain to all eyes, those alternate reigns have not offered a stronger contrast in their principles than in their public fortunes. Let the rank of England be what it might under the protestant sovereign, it *always* sank under the popish: let its loss of honour or of power be what it might under the popish sovereign, it *always* recovered and more than recovered under the protestant: was distinguished by sudden success, public renovation, and increased stability to the freedom and fortunes of the empire:—viewing, therefore,

what has been the unbroken course of providence, with this highly favoured country, for near three centuries past ; nothing but the most wilful scepticism can doubt that the patronage of popery by the British people or the British legislature, would be followed by some tremendous national infliction, compelling us either to descend from the heights of prosperity and glory on which we stand, and retrace our steps to misery and shame, or else abandoning us to that final ruin which would leave England like Judea, a fearful example of the despised long-suffering of God, and the madness of closing our eyes on his bounties, his visitations, and HIS PALPABLE WILL.\*

"In order," says Blackstone, "to secure the established church against perils from non-conformists of all denominations, Jews, Turks, infidels, papists, and sectaries, there were two *bulwarks* erected, called the *Corporation and Test acts*."† These two bulwarks, as we have seen, were removed, preparatory to the introduction of the following act, for the relief of his majesty's Roman catholic subjects, which passed both houses by large majorities, and finally was made law by the king's signature, on the 13th April, 1829.

I. WHEREAS by various acts of parliament, certain restraints and disabilities are imposed on the Roman catholic subjects of his majesty, to which other subjects of his majesty are not liable: and, whereas, it is expedient that such restraints and disabilities shall be from henceforth discontinued: and, whereas, by various acts, certain oaths and certain declarations, commonly called the declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass, as practised in the church of Rome, are, or may be required to be taken, made, and subscribed by the subjects of his majesty, as qualifications for sitting or voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights: be it enacted, that all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his majesty's subjects, as a qualification for sitting and voting in parliament, or for the exercise and enjoyment of any office, franchise, or civil right, be, and the same are (save as hereinafter provided and excepted) hereby repealed.

II. It shall be lawful for any person professing the Roman catholic religion, being a peer, or who shall, after the commencement of this act, be returned as a member of the house of commons, to sit and vote in either house of parliament respectively, being, in all other respects, duly qualified to sit and vote therein, upon taking and subscribing the following oath, instead of the oaths of allegiance, supremacy, and abjuration.

I, A. B., do sincerely promise and swear that I will be faithful, and bear true allegiance to his majesty, king . . . . ., and will defend him, to the utmost of my power, against all conspiracies and attempts whatever, which shall be made against his person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown, which succession is, and stands limited to the princess Sophia, electress of Hanover, and the heirs of her body, being protestants: hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm; and I do further declare, that it is not an article of my faith, and that I do renounce, reject, and abjure the opinion that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be

\* Tracts and Speeches in different parts of the kingdom, during the discussion of the bill.

† Comm. vol. iv. p. 56.

deposed or murdered by their subjects, or by any person whatsoever; and I do declare, that I do not believe that the pope of Rome, or any foreign prince, prelate, person, state, or potentate hath, or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. I do swear that I will defend, to the utmost of my power, the settlement of property within this realm, as established by the laws; and I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law, within this realm; and I do solemnly swear that I will never exercise any privilege, to which I am, or may become entitled, to disturb or weaken the protestant religion or protestant government in the united kingdom; and I do, solemnly, in the presence of God, profess, testify, and declare that I do make this declaration, and every part thereof, in the plain or ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me God.

III. Provides that the name of the reigning sovereign, for the time being, shall be used in the oath, with proper words of reference thereto.

IV. No peer nor person professing the Roman catholic religion is capable of sitting and voting in either house of parliament, unless he shall first take and subscribe the above oath, before the same persons, at the same times and places, and in the same manner as the former oaths were required to be taken and subscribed; and any person professing the Roman catholic religion, who shall sit and vote in either house of parliament, without having first taken and subscribed the above oath, shall be subject to the same pains, penalties, forfeitures, and disabilities to which parties neglecting the former oaths were subject.

V. Persons professing the Roman catholic religion may vote at elections of members to serve in parliament, and also of representative peers of Scotland and Ireland, and to be elected, such representative peers being, in all other respects, duly qualified upon taking and subscribing the foregoing oath.

VI. The aforesaid oath is to be administered to every Roman catholic, to enable them to vote in the same manner, at the same time, and by the same officers as the former oaths were; and wherever a certificate was formerly necessary, the same is still required.

VII. Persons administering oaths at elections are themselves required to take an oath in addition, for the due administration of the above oath, and for duly granting certificates.

VIII. Such part of the act of the parliament of Scotland,\* for preventing the growth of popery, is hereby repealed, being inexpedient; and Roman catholics may elect, or be elected for any county or district of burghs in Scotland.

IX. No priest or person in holy orders, in the church of Rome, is capable of being elected to serve in parliament, as a member of the house of commons.

X. Persons professing the religion of Rome may hold, exercise, and enjoy, all civil and military offices, and places of trust or profit, and may exercise any other franchise, or civil right, with certain exceptions.

XI. Nothing in this act shall exempt any Roman catholic from the necessity of taking any oaths, or making any declarations, not mentioned in this act, which may be required to be taken.

XII. Nothing herein contained shall extend, or be construed to extend, to enable any person or persons professing the Roman Catholic religion, to hold or exercise the office of guardians and justices of the united kingdom, or of regent of the united kingdom, under whatever name, style, or title, such office may be constituted; nor to enable any person, otherwise than he is now by law enabled, to hold or enjoy the office of lord high chancellor, lord keeper, or lord commissioner, or keeper of the great seal of England, or of Ireland; or the office of lord lieutenant, or lord deputy, or other chief governor of Ireland; or his majesty's commissioner to the general assembly of the church of Scotland.

XIII. This act does not alter any of the provisions of the act † for consolidating and amending the laws regulating the levy and application of church rates and parish cesses, the election of church wardens, and the maintenance of parish clerks in Ireland.

XIV. Roman catholics may be members of any lay body corporate, and hold any civil office, place of trust, or profit, therein, and do any corporate act, or vote in any corporate election, or other proceeding, upon taking and subscribing the above oath.

\* 1 WILL. III. c. 3.

† 7 Geo. IV. c. 72.

XV. Nothing in this act shall authorize or empower any of his majesty's Roman catholic subjects, being members of any lay body corporate, to vote, or in any manner, to join in the presentation, or election, of any person, to any ecclesiastical benefice whatsoever, or to any office or place belonging to, or connected with, the united church of England and Ireland, or the church of Scotland, being in the gift, patronage, or disposal, of such lay corporate body.

XVI. Nothing in this act shall be construed to enable any persons, otherwise than as they are now by law enabled to hold, enjoy or exercise any office, place, or dignity, of, in, or belonging to, the united church of England and Ireland, or the church of Scotland, or any place or office whatever, in, or belonging to, any of the ecclesiastical courts of judicature of England and Ireland respectively, or any court of appeal from, or review of, the sentences of such courts, or of, in, or belonging to, the commissary court of Edinburgh, or of, in, or belonging to, any cathedral, or collegiate, or ecclesiastical establishment, or foundation: or any office or place whatever, of, in, or belonging to, any of the universities of this realm, or any office or place whatever, and by whatever name the same shall be called, of, in, or belonging to, any of the colleges or halls of the said universities, or the colleges of Eton, Westminster, or Winchester, or any college or school within this realm: or to repeal, abrogate, or in any manner to interfere with any local statute, ordinance, or rule, which is, or shall be, established by competent authority, within any university, college, hall, or school, by which Roman catholics shall be prevented from being admitted thereto, or from residing or taking degrees therein: provided that nothing herein contained shall enable any person, otherwise than as he is now by law enabled, to exercise any right of presentation, to any ecclesiastical benefice whatsoever, or to repeal, vary, or alter, in any manner, the laws now in force, in respect to the right of presentation to any ecclesiastical benefice.

XVII. Whenever any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of his majesty, his heirs, or successors, and such office shall be held by a Roman catholic, the right of presentation shall devolve upon, and be exercised by, the archbishop of Canterbury, for the time being.

XVIII. No Roman catholic shall, either directly or indirectly, advise his majesty, regent, &c., or the lord lieutenant, &c., of Ireland, touching or concerning the appointment or disposal of any office or preferment, in the united churches of England and Ireland, or the church of Scotland, and offenders, when duly convicted, shall be guilty of a high misdemeanor, and disabled for ever from holding any office, civil or military, under the crown.

XIX. After the commencement of this act, any Roman catholic who shall be clerk, elected, or chosen, to the office of mayor, provost, alderman, recorder, bailiff, town-clerk, magistrate, counsellor, or common-councilman, &c., of any city, corporation, borough, burgh, or district, within the united kingdom of Great Britain and Ireland, shall, within one calendar month, next before, or upon his admission, subscribe the oath hereinbefore appointed and set forth, in the presence of the proper officer.

XX. Every Roman catholic who shall be appointed to any office or trust under his majesty, &c., shall, within three calendar months, take the before mentioned oath, before he presumes to exercise or enjoy it.

XXI. Roman catholics appointed to offices, and neglecting to take the oath, shall forfeit, to the king, the sum of two hundred pounds, and lose the place beside.

XXII. Military and naval persons are to take the oaths at the same time and in the same manner as formerly required.

XXIII. No oaths are required of Roman catholics for enabling them to hold real or personal property, other than is taken by other subjects: and that the oath herein appointed and set forth, being taking and subscribed in any of the courts, shall be of the same force and effect to all intents and purposes as, and shall stand in the place of, all oaths and declarations required or prescribed by any law now in force for the relief of his majesty's Roman catholic subjects from any disabilities, incapacities, or penalties: and the proper officer of any of his majesty's courts, in which any person professing the Roman catholic religion shall demand to take and subscribe the oath herein appointed and set forth, is hereby authorized and required to administer the said oath to such person: and such officer shall make, sign, and deliver, a certificate of such oath having been duly taken and subscribed as often as the same shall be demanded of him, upon payment of one shilling: and such certificate shall be

sufficient evidence of the person therein named, having duly taken and subscribed such oath.

XXIV. And, whereas, the protestant episcopal church of England and Ireland, and the doctrine, discipline, and government thereof, and likewise the protestant presbyterian church of Scotland, and the doctrine, discipline, and government thereof, are, by the respective acts of Union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably: and, whereas, the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, as well in England as in Ireland, have been settled and established by law: if any person, therefore, after the commencement of this act, other than the person thereunto authorized by law, shall assume or use the name, style, or title of archbishop of any province, bishop of any bishopric, or dean of any deanery, in England or Ireland, he shall, for every such offence, forfeit and pay the sum of one hundred pounds.

XXV. If any judicial or civil officers, or mayors, provosts, &c., of cities or boroughs shall be present at, or attend, any place or public meeting for religious worship, either in England, Ireland, or Scotland, other than the respective established churches of these kingdoms, in the robe, gown, or other peculiar habit of his office, or its ensign, or insignia, or any part thereof, shall forfeit and pay, for every offence, one hundred pounds.

XXVI. If any Roman catholic ecclesiastic, or any member of any of their orders, communities, or societies, shall exercise any of the rites and ceremonies of the Roman catholic religion, or wear the habits of his order, save within their own usual places of worship, or in private houses, he shall forfeit the sum of fifty pounds.

XXVII. Nothing in this act shall, in any manner, repeal or alter any of the provisions of the act\* relating to burials in suppressed monasteries, &c.

XXVIII. And whereas, Jesuits and members of other religious orders, communities, or societies of the church of Rome, bound by monastic or religious vows, are resident within the united kingdom: and it is expedient to make provision for the gradual suppression and final prohibition of the same therein: every Jesuit, therefore, or member of other religious orders, who, at the commencement of this act, were within the kingdom, were required, within six months, to deliver a notice or statement to the clerk of the peace, &c., to be kept among the records of the county, a copy of which to be transmitted to the lord lieutenant or chief secretary of state; and offenders shall forfeit fifty pounds for every month of his residence without having delivered such notice.

XXIX. All Jesuits or members of other orders who shall come into this realm, after the passing of this act, shall be guilty of a misdemeanor, and be banished the kingdom for life.

XXX. Jesuits who are natural born subjects, residing out of the realm, may return and be registered.

XXXI. Any one of his majesty's principal secretaries of state, being a protestant, may grant licenses to Jesuits, &c., to come into the kingdom, and remain for such time as the secretary shall think proper: and if he see cause, he may revoke the same before expiry of the time.

XXXII. Accounts of all such licenses shall be laid before parliament, as shall have been granted within twelve months preceding.

XXXIII. To admit persons or to administer vows to them, binding them to monastic orders, the party shall be guilty of a misdemeanor in England, and in Scotland be punished by fine and imprisonment.

XXXIV. And any person so admitted a Jesuit or member of a religious order, shall be guilty of a misdemeanor, and banished the kingdom for life.

XXXV. XXXVI. And any person sentenced to be banished, and not leaving the kingdom, shall be sent out by force; and if at large after three months, may be transported for life.

XXXVII. Nothing in this act shall affect female societies, bound by religious vows.

XXXVIII. XXXIX. XL. All penalties imposed by this act, by the attorney general in England and Ireland and the advocate general in the court of exchequer in Scotland. This

act \* might have been repealed, altered, or amended, during the session of that parliament; and it commenced ten days after enactment.

A bill was carried at same time, disfranchising the forty shilling freeholders of Ireland,† but the subsequent bill for Reform of parliament has rendered it a dead letter. The act for consolidating and amending the laws of England, relative to offences against the person, commonly called lord Lansdowne's act, was extended to Ireland on the 4th June, 1829.‡ And on the same date, an act for the more effectual punishment of attempts to murder, in certain cases, in Scotland, passed both houses: the provisions of which are as follow:—

That the act § which made provision for the further prevention of malicious shooting and attempting to discharge loaded firearms, stabbing, cutting, wounding, poisoning, and disabling his majesty's subjects, did not extend to the punishment of cases of attempts to murder by means of suffocation, strangulation, and drowning, and it being expedient that a suitable punishment should attach to such crimes; that act is hereby repealed, and its provisions re-enacted and united with this act. II. Therefore, if any person within Scotland, wilfully, maliciously, and unlawfully, shoot at any of his majesty's subjects, or present, point, or level, any kind of loaded firearms, at any one, and attempt, by drawing a trigger, or in any other manner, to discharge the same at or against their persons: or shall stab or cut any person, with intent, in so doing or by means thereof, to murder or maim, disfigure or disable any person, or with intent to do some other grievous bodily harm to any person: or shall, wilfully, maliciously, and unlawfully administer, or cause to be administered, to any person, any deadly poison or other noxious or destructive substance or thing, with intent, by means thereof, to murder or disable any person, or to do them some grievous bodily harm: or shall, wilfully, &c., attempt to suffocate, or strangle, or drown any person, or with the intent to murder or disable them, or to do them some grievous bodily harm: such actor, or art and part of one or more of these offences, shall be held guilty of a capital crime and receive sentence of death. III. And if any person in Scotland shall maliciously, &c., throw at, or otherwise apply to, any person, any sulphuric acid, or other corrosive substance, calculated by external application to burn or injure the human frame, with intent, by so doing, to murder, maim, disfigure, or disable any person, or to do them some other grievous bodily harm, and when any person, accordingly, shall be maimed, disfigured, disabled, or receive other grievous bodily harm, the actor, or art and part, shall be held guilty of a capital crime, and receive sentence of death accordingly.¶

We have now brought the legal transactions of the reign of the fourth George to a termination. And we have seen that in his reign the most extensive and fundamental changes have been made in the criminal law, whereby it has been greatly improved and extended, both for the benefit of the subject and the better administration of justice. King George IV. died at Windsor, on the 26th of June, 1830, in the eleventh year of his reign, and the sixty-fourth of his age. He was succeeded by his third brother, his royal highness the duke of Clarence, under the style and title of William IV. Soon after his accession to the throne, he granted the reform of parliament, and other bills for the reform of the boroughs of England and

\* 10 Geo. IV. c. 7. † 10 Geo. IV. c. 8. ‡ 10 Geo. IV. c. 34. § 6 Geo. IV. c. 126.

¶ 10 Geo. c. 38.



Ireland, and the burghs of Scotland: all which we sincerely hope may tend to the happiness and prosperity of the people of Great Britain and Ireland.

The dreadful scourge of the Asiatic cholera having desolated the three kingdoms in the year 1832, and carried dismay and death into almost every family, acts \* were passed authorizing energetic measures of precaution to prevent its spreading, and to alleviate the distress of those who were attacked by it. In May, 1832, an act was passed for consolidating and amending the laws against offences relating to the coin, wherein the counterfeiting of gold or silver coin, or the colouring pieces of metal, with the intent to make them pass for coin, subjects the party to transportation for life: impairing, diminishing, or lightening gold or silver coin, and passing them for full value, is liable to fourteen years' transportation: buying, selling, or importing counterfeit coin, is transportation for life: making, mending, or having in possession any coining tools, is transportation for life.†

There were no other acts passed of such a nature, in this reign, as to require notice here, and we therefore hasten to produce the following important act which passed both houses after a long and protracted debate, and received the royal assent on the 7th June, 1832.

AN ACT TO AMEND THE REPRESENTATION OF THE PEOPLE OF  
ENGLAND AND WALES.

‘WHEREAS it is expedient to take effectual measures for correcting divers abuses that have long prevailed in the choice of members to serve in the commons house of parliament, to deprive many inconsiderable places of the right of returning members, to grant such privileges to large, populous, and wealthy towns, to increase the number of the knights of the shire, to extend the elective franchise to many of his majesty's subjects, who have not heretofore enjoyed the same, and to diminish the expense of elections;’ be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same; that each of the boroughs enumerated in the schedule marked (A), to this act annexed, that is to say, *Old Sarum, Newtown, St Michael's or Midshall, Gatton, Bramber, Bossiney, Dunwich, Ludgershall, St Mawes, Beeralston, West Looe, St Germans, Newport, Blechingly, Aldborough, Camelford, Hindon, East Looe, Corfe Castle, Great Redwin, Yarmouth, Queenborough, Casle Rising, East Grinstead, Higham Ferrers, Wendover, Weobly, Winchelsea, Tregony, Haslemere, Sallash, Orford, Callington, Newton, Ilchester, Boroughbridge, Stockbridge, New Romney, Hedon, Plympton, Seaford, Heytesbury, Sleyning, Whitchurch, Wootton Bassett, Downton, Fowey, Milbourne Port, Aldburgh, Minehead Bishops Castle, Okehampton, Appleby, Lostwithiel, Brackley, and Amersham*, shall from, and after the end of this present parliament, cease to return any member or members to serve in parliament.

II. And be it enacted, that each of the boroughs enumerated in the schedule marked (B), that is to say, *Petersfield, Ashburton, Eye, Westbury, Wareham, Midhurst, Woodstock, Wilton, Malmesbury, Liskeard, Reigate, Hythe, Droithwich, Lyme Regis, Launceston, Shaftesbury, Thirsk, Christchurch, Horsham, Great Grimsby, Calne, Arundel, St Ives, Rye, Clitheroe, Morpeth, Helston, Northallerton, Wallingford, and Dartmouth*, shall from and after the end of this present parliament, return one member and no more, to serve in parliament.

III. Each of the places named in schedule (C), that is to say, *Manchester, Birmingham,*

\* 2 Will. IV., c. 10 & 11.

† 2 Will. IV., c. 34.

*Leeds, Greenwich, Sheffield, Sunderland, Davenport, Wolverhampton, Tower Hamlets, Finsbury, Mary-le-Bone, Lambeth, Bolton, Bradford, Blackburn, Brighton, Halifax, Macclesfield, Oldham, Stockport, Stoke-upon-Trent, and Stroud*, shall for the purposes of this act be a borough, and shall as such, include the place, or places, respectively, which shall be comprehended within the boundaries of such borough, as shall be settled and described by an act to be passed for that purpose in this present parliament, which act shall be deemed and taken to be part of this act, as fully, and effectually, as if the same were incorporated herewith, and that each of the said boroughs shall, from and after the end of this present parliament, return two members to serve in parliament.

IV. Each of the places named in schedule D, that is to say, *Ashton-under-Line, Bury, Chatham, Cheltenham, Dudley, Frome, Gateshead, Huddersfield, Kidderminster, Kendal, Rochdale, Salford, South Shields, Tynemouth, Wakefield, Walsall, Warrington, Whitby, Whitehaven, and Merthyr-Tydvil*, shall be a borough, and shall include the place, or places, respectively, which shall be comprehended within the boundaries of such borough: and that each of the said boroughs, shall return one member to serve in parliament.

V. The borough of new Shoreham shall include the whole of the Rape of Bramber, in the county of Sussex, save and except such parts of the Rape as shall be included in the borough of Horsham; and that the borough of Cricklade shall include the hundreds and divisions of Highworth, Cricklade, Staple, Kingsbridge, and Malmesbury, in the county of Wilts, save and except, such parts of the said hundred of Malmesbury, as shall be included in the borough of Malmesbury: and that the borough of Aylesbury shall include the three hundreds of Aylesbury, in the county of Buckingham: and that the borough of East Retford shall include the hundred of Basset Law, in the county of Nottingham, and all places locally situate within the outside boundary, or limit, of the hundred of Basset Law, or surrounded by such boundary, and by any part of the counties of Lincoln or York.

VI. The borough of Weymouth, and Melcombe-Regis, shall return two members, and no more, to serve in parliament, and the borough of Penryn shall include the town of Falmouth, and the borough of Sandwich shall include the parishes of Deal and Walmer.

VII. Every city and borough in England which now returns a member, or members to serve in parliament, and every place sharing in the election therewith, (except the several boroughs enumerated in schedule A, and except the several boroughs of New Shoreham, Cricklade, Aylesbury, and East Retford) shall, and each of the said boroughs of Penryn and Sandwich also shall, include the place or places respectively, which shall be comprehended within the boundaries of any such city, borough, or place, as such boundaries shall be settled and described.

VIII. Each of the places named in the first column of schedule E, shall have a share in the election of a member to serve in all future parliaments for the shire, town, or borough, which is mentioned in conjunction therewith, and named in the second column of the said schedule E.

IX. Each of the places named in the first column of the said schedule E, and each of the shire towns, or boroughs named in the second column, and the borough of Brecon shall include the place or places respectively, which shall be comprehended within the boundaries, of each of the said places, shire towns, or boroughs respectively.

X. Each of the towns of Swansea, Loughor, Neath, Aberavon, and Kenfig, shall include the place or places respectively, which shall be comprehended within the boundaries of each of the said towns: and that the said five towns, so included as aforesaid, shall be one borough, and shall, as such borough, return one member to serve in parliament; and that the Portreeve of Swansea shall be the returning officer for the said borough; and that no person by reason of any right accruing in any of the said five towns, shall have any vote in the election of a member to serve in any future parliament for the borough of Cardiff.

XI. The persons respectively described in schedules C and D, shall be the returning officers at all elections of a member or members to serve in parliament for the boroughs in conjunction with which such persons are respectively mentioned in the said schedules C and D: and, that, for those boroughs, in the said schedules, for which no persons are mentioned in such schedules, as returning officers, the sheriff for the time being of the county, in which such boroughs are respectively situate, shall within two months after the passing of this act,

and in every succeeding respective year in the month of March, by writing under his hand to be delivered to the clerk of the peace, of the county, within one week, and to be by such clerk of the peace, filed and preserved with the records of his office, nominate and appoint for each of such boroughs a fit person, being resident therein, to be, and such person so nominated and appointed, shall accordingly be, the returning officer for each of such boroughs respectively, until the nomination be made in the succeeding March; and, in the event of the death of any such person, or of his becoming incapable to act by reason of sickness, or other sufficient impediment, the sheriff for the time being shall, on notice thereof, forthwith nominate and appoint in his stead a fit person, being so resident as aforesaid, to be, and such person so nominated and appointed shall accordingly be, the returning officer for such borough, for the remainder of the then current year: and no person, having been so nominated and appointed as returning officer for any borough, shall, after the expiration of his office, be compellable at any time thereafter, to serve again in the said office for the said borough; provided always, that no person being in holy orders, nor any churchwarden, or overseer of the poor, within any such borough, shall be nominated or appointed as such returning officer for the same: and that no person, nominated or appointed as returning officer for any borough, now sending or hereafter to send members to parliament, shall be appointed a churchwarden or overseer of the poor therein, during the time for which he shall be such returning officer: provided, also, that no person, qualified to be elected to serve as a member in parliament, shall be compellable to serve as a returning officer for any borough, for which he shall have been nominated and appointed by the sheriff as aforesaid, if within one week after he shall have received notice of his nomination and appointment as returning officer, he shall make oath of such qualification before any justice of the peace, and shall forthwith notify the same to the sheriff: provided, also, that in case his majesty shall be pleased to grant his royal charter of incorporation to any of the boroughs, named in the said schedules, C and D, which are not now incorporated, and shall, by such charter, give power to elect a mayor or other chief municipal officer, for any such borough, then, and in every such case, such mayor, &c., for the time being, shall be the only returning officer for such borough, and the provisions herein before contained, with regard to the nomination and appointment of a returning officer for such borough, shall thenceforth cease and determine.

XII. In all future parliaments, there shall be six knights of the shire instead of four, to serve for the county of York, that is to say, two knights for each of the three ridings of the said county, to be elected in the same manner, and by the same classes and description of voters, and in respect of the same several rights of voting, as if each of the three ridings were a separate county; and that the courts for the election of knights of the shire, for the North Riding of the said county, shall be holden at the city of York, for the West Riding of the said county, shall be holden at Wakefield, and for the East Riding, at Beverly.

XIII. In all future parliaments, there shall be four knights of the shire instead of two, to serve for the county of Lincoln; two for the parts of Lindsesey, in the said county, and two for the parts of Kesteven and Holland, in the same county: and that such four knights shall be chosen in the same manner, and by the same classes and descriptions of voters, and in respect of the same several rights of voting, as if the said parts of Lindsesey, and of Kesteven, and Holland, were separate counties: and that the court for the election of the knights of the shire, for the parts of Lindsesey, shall be holden in the city of Lincoln, and for the parts of Kesteven and Holland, at Sleaford.

XIV. Each of the counties enumerated in schedule F, shall be divided into two divisions, which divisions shall be settled and described by an act passed for that purpose, in this present parliament, which act, when passed, shall be deemed and taken to be part of this act; and that, in all future parliaments, there shall be four knights of the shire instead of two, to serve for each of the said counties, that is to say, two knights of the shire for each division of the said counties: and that such knights shall be chosen in the same manner, and by the same classes and descriptions of voters, and in respect of the same several rights of voting, as if each of the said divisions were a separate county: and that the courts for the elections of the knights of the shires, for each division of the said counties, shall be holden at the place to be named for that purpose, in the act so to be passed as aforesaid, for settling and describing the divisions of the said counties.

XV. In all future parliaments there shall be three knights of the shire instead of two, to serve for each of the counties enumerated in schedule F 2, and two knights of the shire instead of one, to serve for each of the counties of Carmarthen, Denbigh, and Glamorgan.

XVI. The isle of Wight in the county of Southampton shall be a county of itself, separate and apart from the county of Southampton, and shall return one knight of the shire, to serve in every future parliament: and that such knight shall be chosen by the same classes and descriptions of voters, and in respect of the same several rights of voting as the same classes and descriptions of voters, and in respect of the same several rights of voting, as any knight of the shire that shall be chosen in any county of England: and that all elections for the said county of the isle of Wight, shall be holden at the town of Newport, in the isle of Wight, and the sheriff of the isle of Wight or his deputy shall be the returning officer at such elections.

XVII. For the purpose of electing a knight or knights of the shire, to serve in any future parliament, the east riding of the county of York, the north riding of the county of York, the parts of Lindsey, in the county of Lincoln, and the several counties at large, enumerated in the second column of schedule G, shall respectively include the several cities and towns and counties of the same, which are respectively mentioned in conjunction with such ridings, parts, and counties at large, and named in the first column of the said schedule G.

XVIII. No person shall be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, or in the election of a member or members, to serve in any future parliament for any city or town, being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life or the life of another, or for any lives whatsoever, except such persons shall be in the actual and *bona fide* occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or to any office, or except the same shall be of the clear yearly value of not less than ten pounds above all rents and charges payable out of, or in respect of the same: any statute or usage to the contrary notwithstanding: provided always that nothing in this act contained shall prevent any person seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold land or tenements in respect of which he now has, or but for the passing of this act he might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the provisions hereinafter contained.

XIX. Every male person of full age, and not subject to any legal incapacity, who shall be seised at law, or in equity of any lands or tenements of copyhold, or any other tenure except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than ten pounds, over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, for the county or for the riding, parts or divisions of the county in which such lands or tenements shall be respectively situate.

XX. Every male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee to any lands or tenements, whether of freehold or any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created, for a period of not less than sixty years (whether determinable for a life or lives, or not) of the clear yearly value, of not less than ten pounds, over and above all rents and charges, payable out of, or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created, for a period of not less than twenty years (whether determinable on a life or lives, or not) of the clear yearly value of not less than fifty pounds, over and above all rents and charges, payable out of, or in respect of the same, or who shall occupy, as tenant, any lands or tenements for which he shall be, *bona fide*, liable to a yearly rent of not less than fifty pounds, shall be entitled to vote in the election of a knight or knights of the shire, to vote in any future parliament for the county, or for the riding, parts, or division, in which such lands or tenements shall be respectively situate: provided, always, that no person, being only a sub-lessee, or the assignee of any underlease, shall have a right to vote in such election, in respect of any such term of sixty years or twenty years, as aforesaid, unless he shall be in the actual occupation of the premises.

XXI. No public or parliamentary tax, nor any church rate, county rate, or parochial rate, shall be deemed to be any charge payable out of, or in respect of, any lands or tenements within the meaning of this act.

XXII. In order to entitle any person to vote in the election of a knight of the shire or other member, to serve in any future parliament, in respect of any messuages, lands, or tenements, whether freehold or otherwise, it shall not be necessary that the same shall be assessed to the land tax : any statute to the contrary notwithstanding.

XXIII. No person shall be allowed to have any vote in the election of a knight or knights of the shire, for, or by reason of any trust, estate, or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents or profits of the same estate, but that the mortgagor or cestuique trust in possession, shall and may vote for the same estate notwithstanding such mortgage or trust.

XXIV. Notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of knights of the shire, to serve in any future parliament, in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself, together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building, being separately or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough, in respect thereof.

XXV. Notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, in respect of his estate or interest, as a copyholder or customary tenant, or tenant in ancient demesne, holding by copy of court roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid in any house, warehouse, counting-house, shop, or other building or in any land occupied together with a house, &c., either separately or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him or any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

XXVI. Notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire, in any future parliament, unless he shall have been duly registered according to the provisions hereinafter contained : and that no person shall be registered, in any year, in respect of his estate or interest in any lands or tenements, as freeholder, copyholder, customary tenant, or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months at least, next previous to the last day of July in such year, which said period of six calendar months shall be sufficient, any statute to the contrary notwithstanding : and that no person shall be so registered in any year, in respect of any lands or tenements held by him, as such lessee or assignee, or as such occupier or tenant as aforesaid, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, as the case may require, for twelve calendar months next previous to the last day of July in such year : provided, always, that when any lands or tenements, which would otherwise entitle the owner, holder, or occupier thereof to vote in any such election, shall come to any person, at any time, within such respective periods of six or twelve calendar months, by descent, succession, marriage, marriage settlement, devise or promotion to any benefice in a church, or by promotion to any office, such person shall be entitled, in respect thereof, to have his name inserted as a voter in the election of a knight or knights of the shire, in the lists then next to be made, by virtue of this act hereinafter mentioned, and upon his being duly registered according to the provisions hereinafter contained, to vote in such election.

XXVII. In every city or borough which shall return a member or members, to serve in any future parliament, any male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop,

or other building, being either separately or jointly with any land, within such city, borough, or place occupied therewith, by him as owner, or occupied therewith by him as tenant, under the same landlord, of the clear yearly value of not less than ten pounds, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members, to serve in any future parliament for such city or borough: provided, always, that no such person shall be so registered, in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months, next previous to the last day of July in such year, nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township, made during the time of such his occupation so required as aforesaid, nor unless such person shall have paid, on or before the twentieth day of July in such year, all the poor's rates and assessed taxes which shall have become payable from him, in respect of such premises previously to the sixth day of April then next preceding: provided, also, that no such person shall be so registered in any year unless he shall have resided for six calendar months next previous to the last day of July in such year, within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively, he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof.

XXVIII. The premises, in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city or borough as aforesaid, shall not be required to be the same premises, but may be different premises, occupied in immediate succession by such person during the twelve calendar months next previous to the last day of July in such year, such person having paid, on or before the 20th day of July in such year, all the poor's rates and assessed taxes which shall, previously to the sixth day of April then next preceding, have become payable from him, in respect of all such premises so occupied by him in succession.

XXIX. Where any premises as aforesaid, in any such city or borough, or in any place sharing in the election therewith, shall be jointly occupied by more persons than one, as owners or tenants, each of such joint occupiers shall, subject to the conditions hereinbefore contained as to persons occupying premises in any such city, borough, or place, be entitled to vote in the election for such city or borough, in respect of the premises so jointly occupied, in case the clear yearly value of such premises shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than ten pounds for each and every such occupier, but not otherwise.

XXX. In every city or borough which shall return a member or members, to serve in any future parliament, and in every place sharing in the election for such city or borough, it shall be lawful for any person occupying any house, warehouse, counting-house, house, shop, or other building, either separately or jointly with any land occupied therewith, by him as owner or as tenant, under the same landlord, in any parish or township in which there shall be a rate for the relief of the poor, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate, are hereby required to put the name of such occupier upon the rate for the time being: and in case such overseers shall neglect or refuse so to do, such occupier shall, nevertheless, for the purposes of this act, be deemed to have been rated to the relief of the poor in respect of such premises, from the period at which the rate shall have been made, in respect of which he shall have so claimed to be rated as aforesaid: provided always, that when, by virtue of any act of parliament, the landlord shall be liable to the payment of the rate for the relief of the poor, in respect of any premises occupied by his tenant, nothing herein contained shall be deemed to vary or discharge the liability of such landlord: but that in case the tenant who shall have been rated for such premises, in consequence of any such claim as aforesaid, shall make default in the payment of the poor's rate, due in respect thereof, such landlord shall be, and remain, liable for the payment thereof, in the same manner as if he alone had been rated in respect of the premises so occupied by his tenant.

XXXI. In any city or town being a county of itself, in the election for which freeholders or burgage tenants, either with or without any superadded qualification, now have a right to vote, every such freeholder or burgage tenant shall be entitled to vote in the election of a member or members to serve in all future parliaments for such city or town, provided he shall be duly registered according to the provisions hereinafter contained; but no such person shall be so registered in any year, in respect of any freehold or burgage tenement, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use for twelve calendar months next previous to the last day of July in such year, (except when the same shall have come to him at any time within such twelve months, by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or to any office,) nor unless he shall have resided for six calendar months next previous to the last day of July in such year, within such city or town, or within seven statute miles thereof, or of any part thereof: provided always, that nothing in this enactment shall be deemed to vary or abridge the provisions hereinbefore made, relative to the right of voting for any city or town being a county of itself, in respect of any freehold for life or lives: provided also, that every freehold or burgage tenement which may be situate without the present limits of any such city or town being a county of itself, but within the limits of such city or town, as the same shall be settled and described by the act to be passed for that purpose, as hereinbefore mentioned, shall confer the right of voting in the election of a member or members to serve in any future parliament for such city or town, in the same manner as if such freehold or burgage tenement were situate within the present limit thereof.

XXXII. Every person who would have been entitled to vote in the election of a member or members to serve in any future parliament, for any city or borough not included in schedule A, either as burgess or freeman, or in the city of London as a freeman and liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed, nor unless where he shall be a burgess or freeman, or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year, within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken, nor unless where he shall be a burgess and freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year, within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in the second column of schedule E 2: provided always, that no person who shall have been elected, made, or admitted a burgess or freeman since the first day of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid: provided also, that no person shall be so entitled as a burgess or freeman, in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted a burgess or freeman previously to the first day of March, 1831, or from or through some person who since that time shall have become, or shall hereafter become, a burgess or freeman in respect of servitude: provided also, that every person who would have been entitled, if this act had not been passed, to vote as a burgess and freeman of Swansea, Loughor, Neath, Aberavon, or Kenfig, in the election of a member to serve in any future parliament for the borough of Cardiff, shall cease to vote in such election; and shall, instead thereof, be entitled to vote as such burgess or freeman in the election of a member to serve in all future parliaments for the borough composed of the towns of Swansea, Loughor, Neath, Aberavon, and Kenfig, subject always to the provisions hereinbefore contained with regard to a burgess or freeman of any place sharing in the election for any city or borough.

XXXIII. No person shall be entitled to vote in the election of a member or members to serve in any future parliament for any city or borough, save and except in respect of some right conferred by this act, or as a burgess or freeman, or as a freeman and livery-man, or in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as hereinbefore mentioned: provided always, that every person now having a right to vote in the election for any city or borough, (except those enumerated in schedule A,) in virtue of any other qualification than as a burgess or freeman, or as a freeman and livery-man, or, in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as before mentioned, shall retain such right of voting so long as he shall be qualified as an elector, according to the usages and customs of such city or borough, or any law now in force; and such person shall be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough, if duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified as such elector in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed, nor unless such person, when his qualification shall be in any city or borough, shall have resided for six calendar months next previous to the last day of July in such year, within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken, nor unless such person, when his qualification shall be within any place sharing in the election for any city or borough, shall have resided for six calendar months next previous to the last day of July in such place, within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in the second column of schedule E 2: provided nevertheless, that every such person shall for ever cease to enjoy such right of voting for any such city or borough as aforesaid, if his name shall have been omitted for two successive years from the register of such voters for such city or borough hereinafter directed to be made, unless he shall have been so omitted in consequence of his having received parochial relief within twelve calendar months next previous to the last day of July in any year, or in consequence of his absence on the naval or military service of his majesty.

XXXIV. Every person now having a right to vote for the borough of New Shoreham, or of Cricklade, Aylesbury, or East Retford, respectively, in respect of any freehold, where-soever the same may be situate, shall retain such right of voting, subject always to the same provisions as are hereinbefore mentioned with regard to persons whose right of voting for any borough is saved and reserved by this act; save and except that such persons now having a right to vote for the borough of New Shoreham, Cricklade, Aylesbury, or East Retford, respectively, shall not be registered in any year, unless they shall have resided for six calendar months next previous to the last day of July in such year, within either of these above mentioned boroughs respectively, as defined by this act, or within seven statute miles of such respective borough, or of any part thereof; and that for the purpose of the registration hereinafter required, of all persons now having a right to vote for the borough of New Shoreham, in respect of any freehold that may be situate in the borough of Horsham, or for the borough of Cricklade, in respect of any freehold which may be situate in the borough of Malmesbury, as such boroughs of Horsham or Malmesbury may respectively be defined by the act to be passed for that purpose, shall be inserted in the list of voters hereinafter directed to be made by the overseers of that parish or township within the borough of New Shoreham, or the borough of Cricklade, respectively, as defined by this act, which shall be next adjoining to the parish or township in which such freehold shall respectively be situate; and if the parish or township in which any such freehold shall be situate, shall adjoin two or more parishes or townships within either of the said boroughs of New Shoreham or Cricklade, the persons so having a right to vote in respect of such freehold, shall be inserted in the list of voters to be made by the overseers of the least populous of such adjoining parishes or townships, according to the last census for the time being.

XXXV. Provided nevertheless, that notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of a member or members to serve in any future parliaments for any city or borough, (other than a city or town being a county of



itself in the election for which freeholders or burgage tenants have a right to vote as before mentioned) in respect of any estate or interest in any burgage tenement or freehold which shall have been acquired by such person since the first day of March, 1831, unless the same shall have come or been acquired by such person since that day, and previous to the passing of this act, by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office.

XXXVI. No person shall be entitled to be registered, in any year, as a voter in the election of a member or members, to serve in any future parliament for any city or borough, who shall, within twelve calendar months next previous to the last day of July in such year, have received parochial relief or other alms, which, by the law of parliament, now disqualify from voting in the election of members to serve in parliament.

XXXVII. And whereas it is expedient to form a register of all persons entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, and that, for the purpose of forming such register, the overseers of every parish and township should annually make out lists in the manner hereinbefore mentioned; be it therefore enacted, that the overseers of the poor of every parish and township shall, on the twentieth day of June in the present and in every succeeding year, cause to be fixed on or near the doors of all the churches and chapels within such parish or township, or if there be no church or chapel therein, then to be fixed in some public and conspicuous station, within the same respectively, a notice according to the form numbered I., in schedule H., requiring all persons who may be entitled to vote in the election of a knight or knights of the shire, to serve in any future parliament, in respect of any property situate wholly or in part in such parish or township, to deliver or transmit to the said overseers, on or before the twenty-ninth July, in the present and every succeeding year, a notice of their claim as such voters, according to the form numbered II. schedule H., or to the like effect: provided always, that after the formation of the register to be made in each year, as hereinafter mentioned, no person, whose name shall be upon such register for the time being, shall be required thereafter to make any such claim as aforesaid, so long as he shall retain the same qualification, and continue in the same place of abode described in such register.

XXXVIII. The overseers of the poor of every parish and township shall, on or before the last day of July in the present year, make out, or cause to be made out, according to the form numbered III. in schedule H., an alphabetical list of all persons who shall claim as aforesaid, to be inserted in such list as voters in the election of a knight or knights of the shire, to serve for the county, riding, parts, or division of the county wherein such parish or township lies, in respect of any lands or tenements situate wholly or in part within such parish or township; and that the said overseers shall, on or before the last day of July in every succeeding year, make out, or cause to be made out, a like list, containing the names of all persons who shall be upon the register for the time being as such voters, and also the names of all persons who shall claim, as aforesaid, to be inserted in such last mentioned lists as voters: and in every list so to be made by the overseers, the christian name and surname of every person shall be written at full length, together with the place of his abode, the nature of his qualification, and the local or other description of such lands or tenements, as the same are respectively set forth in his claim to vote, and the name of the occupying tenant, if stated in such claim: and the said overseers, if they shall have reasonable cause to believe that any person so claiming, or whose names shall appear in the register for the time being, is not entitled to vote in the election of a knight or knights of the shire, for the county, riding, parts, or division of a county, in which their parish or township is situate, shall have power to add the words, "objected to," opposite the name of every such person, on the margin of such list; and the said overseers shall sign such list, and shall cause a sufficient number of copies of such list to be written or printed, and to be fixed on or near the doors of all the churches and chapels within their parish or township, or if there be no church or chapel, then to be fixed upon some public and conspicuous situation, within the same respectively, on the two Sundays next after such list shall have been made: and the said overseers shall likewise keep a true copy of such list, to be perused by any person without payment of any fee, at all reasonable hours during the two first weeks after such list shall have been made: provided, always, that any precinct or place, whether extra parochial, or other-

wise, which shall have no overseers of the poor, shall, for the purpose of making out such list, be deemed to be within the parish or township adjoining thereto, such parish or township being situate within the same county, riding, parts, or division of a county, as such precinct or place: and if such precinct or place shall adjoin two or more parishes or townships, so situate as aforesaid, it shall be deemed to be within the least populous of these parishes or townships, according to the last census for the time being: and the overseers of the poor of any such parish or township shall insert, in the list for their respective parish or township, the names of all persons who shall claim as aforesaid, to be inserted therein as voters in the election of a knight or knights of the shire, to serve for the county, riding, part, or division of a county in which such precinct or place as aforesaid lies, in respect of any lands or tenements situate wholly or in part within such precinct or place.

XXXIX. Every person who shall be upon the register, for the time being, of voters for any county, riding, parts, or division of a county, or who shall have claimed to be inserted in any list for the then current year of voters, for any county, riding, or parts, or division of a county, may object to any person, as not having been entitled, on the last day of July then next preceding, to have his name inserted in any list of voters for such county, &c., so to be made out as aforesaid: and every person so objecting, (save and except overseers objecting in the manner before mentioned,) shall, on or before the twenty-fifth day of August in the present and in every succeeding year, give, or cause to be given, a notice in writing, according to the form numbered IV. in schedule H, or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted: and the person so objecting shall, also, on or before the twenty-fifth day of August, in the present and in every succeeding year, give to the person objected to, or leave at his place of abode, as described in such list, or personally deliver to his tenant in occupation of the premises described in such list, a notice in writing, according to the form numbered V. in schedule H, or to the like effect; and the overseers shall include the names of persons so objected to in a list, according to the form numbered VI. in schedule H, and shall cause copies of such list to be fixed on or near the doors of all the churches or chapels within their parish or township, or in some public and conspicuous situation within the same respectively, on the two Sundays next preceding the fifteenth day of September, in the present and in every succeeding year: and the overseers shall likewise keep a copy of the names of all the persons so objected to, to be perused by any person, without payment of any fee, at all reasonable hours during the ten days next preceding the said fifteenth day of September, in the present and every succeeding year.

XL. On the twenty-ninth day of August, in the present and every succeeding year, the overseers of every parish and township shall deliver lists of voters, together with a written statement of the number of persons objected to by the overseers and by other persons, to the high constable of the hundred or other like district in which such parish or township is situate: and such high constable shall forthwith deliver all such lists, together with such statements, as aforesaid, to the clerk of the peace of the county, riding, or parts, who shall forthwith make out an abstract of the number of persons objected to by the overseers and by other persons in each parish and township, and transmit the same to the barristers appointed, as hereinafter mentioned, to revise such lists, in order that the said barristers may fix proper times and places for holding their courts for the revision of the said lists.

XLI. The lord chief justice for the court of king's bench, for the time being, shall, in the month of July or August in the present and in every succeeding year, nominate and appoint for Middlesex, and the senior judge, for the time being, in the commission of assizes for every other county, shall, when travelling the summer circuit, in the present and in every succeeding year, nominate and appoint, for every such county or for each of the parts, ridings, or divisions of such counties, barristers to revise the list of voters in the election of knights of the shire: and such barristers so appointed, shall give public notice, as well by advertisement by some of the newspapers circulating within the county, &c., as also, by a notice to be fixed in some public and conspicuous situation, at the principal place of election for the county, &c., (such last mentioned notice to be given three days, at the least, before the commencement of their circuit,) that he or they will make a circuit of the county, riding, parts, or division for which he or they shall be appointed, and of the several times or places at

which he or they will hold courts for that purpose, such terms being between the fifteenth day of September inclusive, and the twenty-fifth day of October inclusive, in the present and every succeeding year, and they shall hold open courts for that purpose, at the times and places so to be announced : and where two or more barristers shall be appointed for the same county, &c., they shall attend at the same places together, but shall sit apart from each other, and hold separate courts at the same time for the dispatch of business ; provided always, that no member of parliament, nor any person holding any office or place of profit under the crown, shall be appointed such barrister, and that no barrister, appointed as aforesaid, shall be eligible to serve in parliament for eighteen months from the time of such his appointment.

XLII. The clerk of the peace shall, at the opening of the first court to be held by every such barrister, for any county, riding, parts, or division of a county, produce, or cause to be produced before him, the several lists of voters for such county, &c., which shall have been delivered to such clerk of the peace, by the high constables : and the overseers of every parish and township, who shall have made out the list of voters, shall attend the court to be held by every such barrister, at the place appointed for revising the lists relating to such parish and township respectively, and also shall deliver to such barrister, a copy of the list of the persons objected to ; and the said overseers shall answer, upon oath, all such questions as such barrister may put to any of them, touching any matter necessary for revising the list of voters : and any such barrister shall retain, on the list of the voters, the names of all persons to whom no objection shall have been made by the overseers or by any other person : and he shall also retain, on the list of voters, the name of any person who shall have been objected to by any person other than the overseers, unless the party so objecting shall appear by himself or by some one on his behalf, in support of such objection : and when the name of any person, inserted in the list of voters, shall have been objected to by the overseers, or by any other person, and such person, so objecting, shall appear by himself or by some one on his behalf in support of such objection, every such barrister shall require it to be proved that the person so objected to was entitled, on the last day of July then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list ; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated, by any law or statute, from voting in the election of members to serve in parliament, such barrister shall expunge the name of any such person from the said lists ; and he shall also expunge from the said lists the name of every person who shall be proved to him to be dead ; and shall correct any mistake which shall be proved to him to have been made in any of the said lists, as to any of the particulars by this act required to be inserted in such lists ; and when the christian name of any person, his place of abode, or the nature of his qualification, or the local or other description of his property, or the name of the tenant in occupation thereof, as the same respectively are required to be inserted in any such list, shall be wholly omitted therefrom, such barrister shall expunge the name of every such person from every such list, unless the matter or matters so omitted be supplied to the satisfaction of such barrister, before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list, except in case of his death or of his being objected to on the margin of the list by the overseers as aforesaid, or in case of any such omissions as last mentioned, unless such notice as is hereinbefore required in that behalf shall have been given to the overseers, nor unless such notice as is required in that behalf shall have been given to such person, or left at his place of abode, or delivered to his tenant.

XLIII. Provided also, that if it shall happen that any person who shall have given to the overseers of any parish or township, due notice of his claim to have his name inserted in the list of voters in the election of knights of the shire shall have been omitted by such overseers from such list, it shall be lawful for the barrister, upon the revision of such list, to insert therein the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister, that such person gave due notice of such his claim to the said overseers, and that he was entitled, on the last day of July then next preceding, to be inserted in the list of voters in the election of knights of the shire for the county, riding, parts, or division wherein the parish or township of such overseers may be situate, in respect of any lands or tenements within such parish or township.

XLIV. The overseers of the poor of every parish and township, either wholly or in part situate within any city, or borough, or place sharing in the election for any city or borough, which shall return a member or members to serve in any future parliament, shall, on or before the last day of July, in the present and in each succeeding year, make out, or cause to be made out, according to the form numbered I. in schedule I, an alphabetical list of all persons who may be entitled to vote in the election of members to serve in any future parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than ten pounds, situate wholly or in part within such parish or township, and another alphabetical list, according to the form numbered II. in the said schedule I, of all other persons (except freemen) who may be entitled to vote in the election for such city or borough, by virtue of any other right whatsoever: and in each of the said lists the christian name and surname of any person shall be written at full length, together with the nature of his qualification; and when any person shall be entitled to vote in respect of any property, then the name of the street, lane, or other description of the place where such property may be situate shall be specified in the list: and when any person shall be entitled to vote otherwise than in respect of any property, then the name of the street, lane, or other description of the place of such person's abode, shall be specified in the list: and the overseers shall sign each of such lists, and shall cause a sufficient number of copies of such lists to be printed, and to be fixed on or near the doors of all the churches and chapels in their several parishes and townships, and if there be no church or chapel therein, then to be fixed up in some public conspicuous situation within the same respectively, on the two Sundays next after such lists shall have been made; and the said overseers shall likewise keep true copies of such lists, to be perused by any person, without payment of any fee, at all reasonable hours during the two first weeks after such list shall have been made.

XLV. Every precinct or place, whether extra parochial, or otherwise, having no overseers of the poor, which now is or hereafter may be within any city, or borough, or place sharing in the election for any city or borough, shall, for the purpose of making out the list of voters for such city or borough, be deemed to be within the parish or township adjoining thereto, and situate wholly or partly within such city, or borough, or place sharing in the election therewith: and if such precinct or place shall adjoin two or more parishes or townships so situate, it shall be deemed to be within the least populous of such parishes or townships, according to the last census for the time being: and the overseers of such parish or township shall insert in the list, for their respective parish or township, the names of all persons who may be entitled to vote in the election of members to serve in any future parliament, for any such city or borough, in respect of any property, occupied by such persons, within such city or borough, or within any place sharing in the election therewith, such property being situate wholly or in part within such precinct or place as aforesaid.

XLVI. The town clerk of every city or borough shall, on or before the last day of July in the present and in each succeeding year, make out, or cause to be made out, according to the form numbered III. of schedule I, an alphabetical list of all the freemen of such city or borough who may be entitled to vote in the election of members, to serve in any future parliament, together with the respective places of their abode: and the town clerks of any place sharing in the election for any city or borough shall, at the respective times aforesaid, make out, or cause to be made out, a like list of all the freemen of such place who may be entitled to vote in the election of members to serve in any future parliament, for such city or borough: and every such town clerk shall cause a copy of every such list to be fixed on or near the door of the town hall, or in some public and conspicuous situation within such respective city, borough, or place as aforesaid, on the two Sundays next after; such list to be perused by any person, without payment of any fee, at all reasonable hours during the two first weeks after such list shall have been made: provided always, that when there shall be no town clerk for such city, borough, or place, or when the town clerk shall be dead or incapable of acting, all matters by this act required to be done, by and with regard to the town clerk, shall be done by and with regard to the person executing duties similar to those of the town clerk, and if there be no such person, then, by and with regard to the chief civil officer of such borough or place.

XLVII. Every person whose name shall have been omitted in any such list of voters for

any city or borough so to be made out, as before mentioned, and who shall claim to have his name inserted therein, as having been entitled on the last day of July then next preceding, shall, on or before the twenty-fifth day of August in the present, and in every succeeding year, give, or cause to be given, a notice in writing, according to the form numbered IV. in schedule I; or to the like effect, to the overseers of that parish or township, in the list whereof he shall claim to have his name inserted; or if he shall claim as a freeman of any city or borough, or place sharing in the election therewith, then to the town clerk of such city, borough, or place: and any person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person, as not having been entitled on the last day of July then next preceding, to have his name inserted in any list of voters for the same city or borough; and every person so objecting, shall, on or before the twenty-fifth day of August in the present, and in every succeeding year, give, or cause to be given, a notice in writing, according to the form numbered V. in the said schedule I; or to the like effect, to the overseers, who shall have made out the list in which the name of the person so objected to shall have been inserted; or if the person objected to shall have been inserted in the list of freemen of any city, borough, or place, as aforesaid, then to the town clerk of such city, borough, or place; and the overseers shall include the names of all persons so claiming, as aforesaid, in a list, according to the form numbered VI. in schedule I; and the names of all persons so objected to, as aforesaid, in a list, according to the form numbered VII. in schedule I; and shall cause copies of two such lists to be fixed on or near the doors of all the churches and chapels within their parish or township, or in some public and conspicuous situation within the same, respectively, on the two Sundays next preceding the fifteenth day of September in the present, and in every succeeding year; and every town-clerk shall include the names of all persons so claiming as freemen in a list, according to the form numbered VIII. in schedule I; and the names of all persons so objected to as freemen in a list, according to the form numbered IX. in schedule I; and shall cause copies of such two lists to be fixed on or near the door of the town hall, or in some public and conspicuous situation within his respective city, borough, or place, as aforesaid, on the two Sundays hereinbefore mentioned in the present, and in every succeeding year; and the overseers and town clerks shall likewise keep a copy of the names of all persons so claiming, as aforesaid; and also a copy of the names of all persons so objected to, as aforesaid; to be perused by any person, without payment of any fee, at all reasonable hours, during the ten days next preceding the said fifteenth day of September in the present, and in every succeeding year; and shall deliver a copy of each such list to any person requiring the same, on payment of one shilling for each copy.

XLVIII. For providing a list of such of the freemen of the city of London as are livery-men of the several companies entitled to vote in the election of members to serve in any future parliament for the city of London, the returning officers of the said city shall, on or before the last day of July in the present, and in each succeeding year, issue precepts to the clerks of the said livery companies, requiring them forthwith to make out, or cause to be made out, at the expense of the respective companies, an alphabetical list, according to the form in the schedule K, of the freemen of London, being livery-men of the said respective companies, and entitled to vote in such election; and every such clerk shall sign such list, and transmit the same, with two printed copies thereof, to such returning officers, who shall forthwith fix one such copy in the Guildhall, and one in the Royal Exchange of the said city, there to remain fourteen days in the present and in every subsequent year; and the clerks of the said livery companies shall cause a sufficient number of such lists of freemen and livery-men of their respective companies to be printed, at the expense of the respective companies, and shall keep the same to be perused, without payment of any fee, at all reasonable hours during the two first weeks after such lists shall have been printed; and every person whose name shall have been omitted in any such list of freemen and livery-men, and who shall claim to have his name inserted therein, as having been entitled on the last day of July then next preceding, shall, on or before the twenty-fifth day of August in the present and every succeeding year, give, or cause to be given, a notice in writing, according to the form numbered I. in schedule K, or to the like effect, to the returning officers, and to the clerk of that company in the list whereof he shall claim to have his name inserted; and

the returning officer shall include the names of all persons so claiming, as aforesaid, in a list, according to the form numbered II. in schedule K, and shall cause such last mentioned list to be fixed in the Guildhall and Royal Exchange of the said city, on the two Mondays next preceding the fifteenth day of September in the present and in every succeeding year; and the said returning officers and clerks of the said companies shall likewise keep a copy of the names of all the persons so claiming, as aforesaid, to be perused by any person, without payment of any fee, at all reasonable hours, during the ten days next preceding the said fifteenth day of September in the present and every succeeding year; and any person who shall object to any other person, as not having been entitled on the last day of July then next preceding to have his name inserted in any such livery list, shall, on or before the twenty-fifth day of August in the present and every succeeding year, give to such other person, or leave at his usual place of abode, a notice in writing, according to the form numbered III. in schedule K, or to the like effect; and in the city of London the returning officers shall take the poll or votes of such freemen of the said city, being livery-men of the several companies as are entitled to vote at such election in the Guildhall of the said city; and the said returning officers shall not be required to provide any booth or compartments, but shall appoint, or take one poll for the whole number of such livery-men at the same place.

XLIX. The lord chief justice of the court of King's Bench for the time being, shall, in the month of July or August in the present and every succeeding year, nominate and appoint so many barristers as the said lord chief justice shall deem necessary, to revise the respective lists of voters for the city of London and Westminster, and for the several boroughs in the county of Middlesex; and the senior judge for the time being in the commission of assize for every other county, when travelling the summer circuit in the present and every succeeding year, shall nominate and appoint so many barristers as the said judge shall deem necessary, to revise the respective lists of voters, as well for the several cities and boroughs in every such county, as for every city and town, and county of a city and town, next adjoining to any such county; and the town and county of the town of Kingston-upon-Hull, shall for this purpose be considered as next adjoining to the county of York; and the town and county of a town of Newcastle-upon-Tyne, as next adjoining to the county of Northumberland; and the city and county of the city of Bristol, as next adjoining to the county of Somerset; and the said lord chief justice and judge, respectively, shall have power to nominate and appoint one or more barristers to revise the lists for the same city or borough, or other place as aforesaid, or one barrister only, to revise the lists for several cities, boroughs, and other places, as aforesaid: provided always, that no member of parliament, nor any person holding any place of profit under the crown, shall be appointed such barrister as aforesaid; and that no barrister so appointed as aforesaid, shall be eligible to serve in parliament for eighteen months from the time of his appointment for any city, borough, or other place, as aforesaid, for which he shall be so appointed: provided also, that nothing herein contained shall prevent the same barrister from being appointed to revise the lists for two or more counties, ridings, parts, or divisions, or for any county, riding, part, or division, and any one or more of the cities and boroughs therein.

L. The barristers so appointed to revise the lists of voters for any city or borough, shall hold open courts for that purpose within such city or borough, and also within every place sharing in the election for such city or borough, at some time between the fifteenth day of September, inclusive, and the twenty-fifth day of November, inclusive, in the present and in every succeeding year, having first given three clear days' notice of the holding of such court or courts, to be fixed on all the doors of churches and chapels within such city, borough, or place, respectively; or if there be no church or chapel therein, then to be fixed in some conspicuous public situation within the same, respectively: and the overseers and town clerks, who shall have made out lists of voters, as aforesaid; and in the case of the city of London, the returning officer or officers of the said city shall, at the opening of the first court to be held by every such barrister for revising such lists, produce their respective lists before him; and the said overseers and town clerks shall also deliver to such barrister a copy of the lists of the persons objected to, so made out by them, as aforesaid; and the clerks of the several livery companies of the city of London, and the town clerk of any other city or borough, or place sharing in the election therewith, and the several overseers within every

city, borough, or place, as aforesaid, shall attend the court to be held by every such barrister, for any such city, borough, or place, as aforesaid, and shall answer upon oath all such questions as such barrister may put to them, or any of them, touching any matter necessary for revising the list of voters; and every such barrister shall insert in such list the name of every person who shall be proved, to his satisfaction, to have been entitled on the last day of July then next preceding to have his name inserted in any such list of voters for such city or borough; and such barrister shall retain, on the list of voters for such city or borough, the names of all persons to whom no objection shall have been made, in the manner hereinbefore mentioned; and he shall also retain on the said list the name of every person who shall have been objected to by any person, unless the party so objecting shall appear by himself, or by some one on his behalf, in support of such objection; and when the name of any person inserted in the list of voters for such city or borough shall have been objected to, in the manner hereinbefore mentioned, and the person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, every such barrister shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters for such city or borough, in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of any such person from the said list, and he shall also expunge from the said list the name of any person who shall be proved to him to be dead, and shall correct any mistake which shall be proved to him to have been made in any of the said list, as to any of the particulars by this act required to be inserted in such lists; and where the christian name, or the place of abode, or the nature of the qualification, or the local description of the property of any person who shall be included in any such list, shall be wholly omitted in such list in any case, where the same is by this act directed to be specified therein, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted be supplied to the satisfaction of such barrister, before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: provided always, that no person's name shall be inserted by such barrister in any such list for any city or borough, or shall be expunged therefrom, except in the case of death, or of such omission or omissions as hereinbefore last mentioned, unless such notice shall have been given, as is hereinbefore required, in each of the said cases.

L.I. The overseers of any parish or township shall, for their assistance in making out the lists, in pursuance of this act, (upon request made by them, or any of them, at any reasonable time between the first day of June and the last day of July in the present and in every succeeding year, to any assessor or collector of taxes, or to any other officer having the custody of any duplicate or tax assessment for such parish or township,) have free liberty to inspect any such duplicate or tax assessment, and to extract from them such particulars as may appear to such overseers to be necessary; and any barrister appointed under this act shall have power to require any assessor, collector of taxes, or other officer having the custody of any duplicate or tax assessment, or any overseers having the custody of any poor's rate, to produce the same, respectively, before him, at any court to be held by him, for the purpose of assisting him in revising the lists to be by him revised, in pursuance of this act.

L.II. Every barrister holding any court under this act, as aforesaid, shall have power to adjourn the same from time to time, and from any one place to any other place or places within the same county, riding, parts, or division, or within the same city or borough, or within any place sharing in the election for such city or borough, but so as that no such adjourned court shall be held after the twenty-fifth day of October in any year; and every such barrister shall have power to administer an oath (or in the case of a quaker or Moravian, an affirmation,) to all persons making objection to the insertion or the admission of any name in any of such lists, as aforesaid, and to all persons objected to, or claiming to be inserted in any of such lists, or claiming to have any mistake corrected, or any omission supplied in any of such lists, and to all witnesses who may be tendered on either side; and that, if any person taking any oath, or making any affirmation under this act, shall wilfully swear

or affirm falsely, such person shall be deemed guilty of perjury, and shall be punished accordingly; and that, at the holding of such respective courts, the parties shall not be attended by counsel; and that every such barrister shall, upon the hearing in open court, finally determine upon the validity of such claims and objections, and shall for that purpose have the same powers, and proceed in the same manner (except where otherwise directed by this act,) as the returning officer of any county, city, or borough, according to the laws and usages now observed at elections; and such barrister shall, in open court, write his initials against the names respectively struck out or inserted, and against any part of the said lists in which any mistake shall have been corrected, or any omission supplied, and shall sign his name to every page of the several lists so settled.

LIII. Notwithstanding any thing hereinbefore contained, if it shall be made to appear to the lord chief-justice or judge, who shall have appointed any barristers under this act, to revise the list of voters, that by reason of the death, illness, or absence of any such barrister or barristers, or by reason of the insufficiency of the number of such barristers, or from any other cause, such lists cannot be revised within the period directed by this act, it shall be lawful for such chief-justice or judge, and he is hereby required, to appoint one or more barristers to act in the place of, or in addition to, the barrister originally appointed; and such barristers so subsequently appointed, shall have the same powers and authorities, in every respect, as if they had been originally appointed by such chief-justice or judge.

LIV. The lists of voters for each county, riding, parts, or division of each county, so signed, as aforesaid, by any such barrister, shall be forthwith transmitted by him to the clerk of the peace of the county, riding, or part for which such barrister shall have been appointed; and the clerk of the peace shall keep the said lists among the records of the sessions, arranged with every hundred in alphabetical order, and with every parish and township within such hundred likewise in alphabetical order, and in every parish and township within such hundred likewise in alphabetical order, and shall forthwith cause the said lists to be fairly and truly copied in the same order in a book, to be by him provided for that purpose, and shall prefix to every name so copied out its proper number, beginning the numbers from the first name, and continuing them in a regular series down to the last name, and shall complete and deliver such book on or before the last day of October in the present and in every succeeding year, to the sheriff of the county, or his under-sheriff, who shall safely keep the same, and shall, at the expiration of his office, deliver over the same to his succeeding sheriff or his under-sheriff; and the list of voters for each city or borough, so signed, as aforesaid, by such barrister, shall be forthwith delivered by him to the returning officer for such city or borough, who shall safely keep the same, and shall cause the said lists to be fairly and truly copied in a book, to be by him provided for that purpose, with every name therein numbered, according to the directions aforesaid, and shall cause such book to be completed on or before the last day of October in the present and every succeeding year, and shall deliver over such book, together with the lists, at the expiration of his office, to the person succeeding him in such office; and every such book to be so completed on or before the last day of October in the present year, shall be deemed the register of the electors to vote, after the end of this present parliament, in the choice of a member or members to serve in parliament for the county, riding, parts, or division of a county, city, or borough to which such register shall relate, at any election which may take place after the said last day of October in the present, and before the first day of November in the year one thousand eight hundred and thirty-three; and every such book, to be so completed on or before the last day of October in the year one thousand eight hundred and thirty-three, and in every succeeding year, shall be the register of electors to vote at any election which shall take place between the first day of November inclusive, in the year wherein such respective register shall have been made, and the first day of November in the succeeding year.

LV. The overseers of any parish and township shall cause to be written, or printed, copies of the lists, so by them to be made in the present and in every succeeding year, and shall deliver such copies to all persons applying for the same, on payment of a reasonable price for each copy; and the monies arising from the sale thereof, shall be accounted for by the said overseers, and applied to the same purposes as monies collected for the relief of the poor; and the clerks of the peace shall cause to be written, or printed, copies of the registers of the



elections for their respective counties, ridings, parts, or divisions of their respective counties; and the returning officer of any city or borough, shall cause to be written, or printed, copies of the registers of the electors for such city or borough; and every such clerk of the peace, and every such returning officer, shall deliver such respective copies to all persons applying for the same, on payment of a reasonable price for each copy; and the monies arising from the sale of all such copies, shall be accounted for to the treasurer of the county, riding, or parts.

LVI. For the purpose of defraying the expenses to be incurred by the overseers of the poor, and by the clerk of the peace, in carrying into effect the several provisions of this act, as far as relates to the electors of any county, riding, parts, or division of a county, every person upon giving notice of his claim as such elector to the overseers, as hereinbefore mentioned, shall pay, or cause to be paid to the said overseer, the sum of one shilling; and such notice of claim shall not be deemed valid until such sum shall have been paid; and the overseers of each parish or township shall add all monies so received by them to the money collected, or to be collected, for the relief of the poor in such parish or township; and such monies so added, shall be applicable to the same purposes as monies collected for the relief of the poor; and that for the purpose of defraying the expenses to be incurred by the returning officer of any city or borough, and by the overseers of the several parishes and townships in every city, borough, and place sharing in the election therewith, in carrying into effect the provisions of this act, so far as relates to the electors for such city or borough; every such elector, whose name shall be upon the register of voters for such city or borough for the time being, shall be liable to the payment of one shilling annually, which sum shall be levied and collected from each elector, in addition to, and as a part of, the money payable by him, as his contribution to the rate for the relief of the poor; and such sum shall be applicable to the same purposes as money collected for the relief of the poor; and the expenses incurred by the overseers of any parish or township in making out, printing, and publishing the several lists and notices directed by this act, and all other expenses incurred by them in carrying into effect the provisions of this act, shall be defrayed out of the money collected, or to be collected, for the relief of the poor in such parish or township; and all expenses incurred by the returning officer of any city or borough, in causing the lists of the electors for such city or borough to be copied out and made into a register, and in causing copies of such register to be written or printed, shall be defrayed by the overseer of the poor of the several parishes and townships within such city, borough, or place sharing in the election therewith, out of the money collected or to be collected for the relief of the poor in such parishes or townships; and all expenses incurred by the clerk of the peace of any county, riding, or parts, in causing the lists of the electors for such county, riding, parts, or for any division of such county, to be copied out and made into a register, and in causing copies of such register to be written or printed, and in otherwise carrying into effect the provisions of this act, shall be defrayed by the treasurer of such county, riding, or parts, out of any public money in his hands, and he shall be allowed all such payments in his accounts: provided always, that no expenses incurred by any clerk of the peace under this act shall be so defrayed, unless the account shall be laid before the justices of the peace at the next quarter sessions after such expenses shall have been incurred and allowed by the court.

LVII. Every barrister appointed to revise any lists of voters under this act, shall be paid at the rate of five guineas for every day that he shall be so employed, over and above his travelling and other expenses; and every such barrister, after the termination of his last sitting, shall lay, or cause to be laid before the lords commissioners of his majesty's treasury for the time being, a statement of the number of days during which he shall have been so employed, and an account of the travelling and other expenses incurred by him in respect of such employment; and the said lords commissioners shall make an order for the amount to be paid to such barrister.

LVIII. In all elections, whatever, of members to serve in any future parliament, no inquiry shall be permitted at the time of polling, as to the right of any person to vote, except only as follows: that is to say, that the returning officer or his respective deputy shall, if required, on behalf of any candidate, put to any voter, at the time of tendering his vote and not afterwards, the following questions, or any of them, and no other:—

1st, Are you the same person whose name appears as A. B., on the register of voters now in force for the county of . . . . . [or for the . . . . ., riding, parts, or division, &c., or for the city, &c., *as the case may be*]?

2nd, Have you already voted, either here or elsewhere, at this election for the county of . . . . . [or for the . . . . ., riding, parts, or division of the county of . . . . ., or for the city or borough of . . . . ., *as the case may be*]?

3rd, Have you the same qualification for which your name was originally inserted in the register of voters, now in force for the county of, &c., [or for the . . . . ., riding, &c., or for the city, &c., *as the case may be, specifying, in each case, the particulars of the qualification as described in the register*]?

And if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of an indictable misdemeanor, and shall be punished accordingly: and the returning officer or his deputy, or a commissioner or commissioners, to be for that purpose by him or them appointed, shall, (if required on behalf of any candidate at the time aforesaid), administer an oath, (or in case of a Quaker or a Moravian, an affirmation,) to any voter in the following form: (that is to say,)

"You do swear, (or being a Quaker or Moravian, do affirm,) that you are the same person whose name appears as A. B., in the register of voters, now in force for the county of . . . . . [or for the . . . . ., riding, parts, or division of the county of . . . . ., or for the city or borough of . . . . ., *as the case may be*] and that you have not before voted, either here or elsewhere, at the present election for the said county, [or for the said riding, parts, or division of the said county, or for the said city or borough, *as the case may be*]. So HELP YOU GOD."

And no elector shall hereafter, at any such election, be required to take any oath or affirmation, except as aforesaid, either in proof of his freehold or of his residence, age, or other qualification, or right to vote, any law or statute, local or general, to the contrary notwithstanding, and no person claiming to vote at any such election, shall be excluded from voting thereat, except by reason of its appearing to the returning officer or his respective deputy, upon putting such questions as aforesaid, or any of them, that the person so claiming to vote is not the same person whose name appears at such register aforesaid, or that he has previously voted at the same election, or that he has not the same qualification for which his name was originally inserted in such register, or except by reason of such person refusing to take the said oath, or make the said affirmation, or to take or make the oath or affirmation against bribery, or any other oath or affirmation now required by law, and not hereby dispensed with: and no scrutiny shall hereafter be allowed by or before any returning officer, with regard to any votes given or tendered at any election of a member or members, to serve in any future parliament: any law, statute, or usage to the contrary notwithstanding.

LIX. Provided always, that any person, whose name shall have been omitted from any register of voters, in consequence of the decision of the barrister who shall have revised the lists from which such register shall have been formed, may tender his vote at any election at which such register shall be in force, stating, at the same time, the name or names of the candidate or candidates for whom he tenders such vote, and the returning officer or his deputy shall enter upon the poll book any vote so tendered, distinguishing the same from the votes admitted and allowed at such election.

LX. Provided also, that upon petition to the house of commons, complaining of an undue election or return of any member or members to serve in parliament, any petitioner or any person defending such election or return, shall be at liberty to impeach the correctness of the register of voters, in force at the time of such election, by proving that in consequence of the decision of the barrister who shall have revised the lists of voters, from which such register shall have been formed, the name of any person who voted at such election was improperly inserted or retained in such register, or the name of any person who tendered his vote at such election improperly omitted from such register: and the select committee appointed for the trial of such petition shall alter the poll taken at such election, according to the truth of the case, and shall report their determination thereupon to the house, and the house shall thereupon carry such determination into effect, and the return shall be amended or the election

declared void, as the case may be, and the register corrected accordingly, or such other order shall be made as to the house shall seem proper.

LXI. The sheriffs of Yorkshire and Lincolnshire, and the sheriffs of the counties divided by this act, shall duly cause proclamation to be made of the several days fixed for the election of a knight or knights of the shire for the several ridings, parts, and divisions of their respective counties, and shall preside at the election, by themselves or their lawful deputies.

LXII. At every contested election of a knight or knights, to serve in any future parliament, for any county, riding, parts, or division of a county, the polling shall commence at nine o'clock of the forenoon of the next day but two after the day fixed for election, unless such next day but two shall be Saturday or Sunday, and then on the Monday following at the principal place of election, and also at the several places to be appointed as hereinafter directed for taking polls: and such polling shall continue for two days only, such two days being successive days: (that is to say,) for seven hours on the first day of polling, and for eight hours on the second day of polling: and no poll shall be kept open later than four o'clock in the afternoon of the second day: any statute to the contrary notwithstanding.

LXIII. The respective counties in England and Wales, and the respective ridings, parts, and divisions of counties shall be divided into convenient districts for polling, and in each district shall be appointed a convenient place for taking the poll at all elections of a knight or knights of the shire, to serve in any future parliament, and such districts and places for taking the poll shall be settled and appointed by the act to be passed in this present parliament, for the purpose of settling and describing the divisions of the counties enumerated in schedule F: provided that no county, nor any riding, parts, or division shall have more than fifteen districts and respective places appointed for taking the poll for such county, riding, parts, or division.

LXIV. At every contested election for any county, riding, parts, or division of a county the sheriff, under-sheriff, or sheriff's deputy shall, if required thereto, by or on behalf of any candidate, on the day fixed for the election, and if not so required, may, if it shall appear to him expedient, cause to be erected a reasonable number of booths, for taking the poll at the principal place of election, and also at each of the polling places, so to be appointed as aforesaid, and shall cause to be affixed on the most conspicuous part of the said booths, the names of the several parishes, townships, and places for which such booth is respectively allotted: and no person shall be admitted to vote at any such election, in respect of any property situate in any parish, township, or place, except at the booth, allotted for such parish, township, or place, and if no booth shall be allotted for the same, then, at any of the booths of the same district: and in case any parish, township, or place shall happen not to be included in any of the districts to be appointed, the votes in respect of property situate in any parish, township, or place so omitted, shall be taken at the principal place of election for the county or riding, parts or division of the county, as the case may be.

LXV. The sheriff shall have power to appoint deputies to preside, and clerks to take the poll at the principal places of election, and also at the several places appointed for taking the poll for any county, riding, parts, or division of a county, and the poll clerks employed at those several places shall, at the close of each day's poll, enclose and seal their several books, and shall publicly deliver them, so enclosed and sealed, to the sheriff, under-sheriff, or sheriff deputy, presiding at such poll, who shall give a receipt for the same, and shall, on the commencement of the poll on the second day, deliver them back, so enclosed and sealed, to the persons from whom he shall have received them: and on the final close of the poll, every such deputy, who shall have received any such poll books, shall forthwith deliver or transmit the same, so enclosed and sealed, to the sheriff or his under-sheriff, who shall receive and keep all the poll books unopened until the re-assembling of the court on the day next but one after the close of the poll, unless such next day but one shall be Sunday, and then on the Monday following, when he shall openly break the seals thereon, and cast up the number of votes as they appear on the said several books, and shall openly declare the state of the poll, and shall make proclamation of the member or members chosen, not later than two o'clock in the afternoon of the said day.

LXVI. In all matters relative to the election of a knight or knights of the shire, to serve in any future parliament for any county, riding, parts, or division of a county, the sheriff of

the county, his under-sheriff, or any lawful deputy of such sheriff, shall have power to act in all places having any exclusive jurisdiction or privilege whatsoever, in the same manner as such sheriff, under sheriff, or deputy may act within any part of such sheriff's ordinary jurisdiction.

**LXVII.** At every contested election of a member or members, to serve in any future parliament for any city or borough in England, except the borough of Monmouth, the poll shall commence on the day fixed for the election, or on the day next following, or at the latest on the third day, unless any of the said days shall be Saturday or Sunday, and then on the Monday following, the particular day for the commencement of the poll to be fixed by the returning officer: and such polling shall continue for two days only, such days being successive days, (that is to say,) for seven hours on the first day of polling, and for eight hours on the second day of polling: and that the poll shall, on no account, be kept open later than four o'clock in the afternoon of such second day: any statute to the contrary notwithstanding.

**LXVIII.** At every contested election for a member or members, to serve in any future parliament for any city or borough in England, except the borough of Monmouth, the returning officer shall, if required thereto by, or on behalf of, any candidate on the day fixed for the election, and if not required, may, if it shall appear to him expedient, cause to be erected, for taking the poll at such election, different booths for different parishes, districts, or parts of such city or borough, which booths may be situated either in one place or in several places; and shall be so divided and allotted into compartments, as to the returning officer shall seem most convenient, so that no greater number than six hundred shall be required to poll at any one compartment: and the returning officer shall appoint a clerk to take the poll at each compartment, and shall cause to be affixed on the most conspicuous parts of the said booths, the names of the several parishes, districts, and parts for which such booth is respectively allotted: and no person shall be admitted to vote at any such election, except at the booth allotted for the parish, district, or part wherein the property may be situate in respect of which he claims to vote, or in case he does not claim to vote in respect of property, then wherein his place of abode as described in the register may be: but in case no booth shall happen to be provided for any particular parish, district, or part, as aforesaid, the votes of persons voting in respect of property situate in any parish, district, or part so omitted, or having their place of abode therein, may be taken at any of the said booths, and the votes of freemen, residing out of the limits of the city or borough, may be taken at any of the said booths, and public notice of the situation, division, and allotment of the different booths shall be given two days before the commencement of the poll, by the returning officer: and in case the booths shall be situated in different places, the returning officer may appoint a deputy to preside at each place: and at every such election, the poll clerks, at the close of each day's poll, shall enclose and seal their several poll books, and shall publicly deliver them, so enclosed and sealed, to the returning officer or his deputy, who shall give a receipt for the same, and shall, on the commencement of the poll on the second day, deliver them back, so enclosed and sealed, to the persons from whom he shall have received them: and every deputy, so receiving any such poll books, on the final close of the poll, shall forthwith deliver or transmit the same, so inclosed and sealed, to the returning officer, who shall receive and keep all the poll books unopened until the following day, unless such day be Sunday, and then till the Monday following, when he shall openly break the seals thereon, and cast up the number of votes as they appear on the said several books, and shall openly declare the state of the poll, and make proclamation of the member or members chosen, not later than two o'clock in the afternoon of the said day: provided always, that the returning officer or his lawful deputy may, if he think fit, declare the final state of the poll, and proceed to make the return immediately after the poll shall have been closed: provided also, that no nomination shall be made, or election holden, of any member for any city or borough in any church, chapel, or other place of public worship.

**LXIX.** Provided always, that so far as relates to the several boroughs of New Shoreham, Cricklade, Aylesbury, and East Retford, as defined by this act, the said several boroughs shall be divided into convenient districts for polling, and there shall be appointed in each district, a convenient place for taking the poll at all elections of members, to serve in any

future parliament, for each of the said boroughs, which districts and places for taking the poll shall be settled and appointed by an act to be passed in this present parliament.

LXX. Nothing in this act contained shall prevent any sheriff or other returning officer, or the lawful deputy of any returning officer, from closing the poll previous to the time fixed by this act, in any case when the same might have been lawfully closed before the passing of this act: and when the proceedings at any election shall be interrupted or obstructed by any riot or open violence, the sheriff, or other returning officer, or the lawful deputy of any returning officer, shall not, for such cause, finally close the poll, but, in case the proceedings shall be so interrupted or obstructed at any particular polling place or places, shall adjourn the poll at such place or places only until the following day, and, if necessary, shall further adjourn the same until such interruption or obstruction shall have ceased, when the returning officer or his deputy shall again proceed to take the poll at such place or places: and any day whereon the poll shall have been so adjourned shall not, as to such place or places, be reckoned one of the two days of polling at such election, within the meaning of this act: and wherever the poll shall have been so adjourned by any deputy of any sheriff or other returning officer, such deputy shall forthwith give notice of such adjournment to the sheriff or returning officer, who shall not finally declare the state of the poll, or make proclamation of the member or members chosen, until the poll so adjourned, at such place or places as aforesaid, shall have been finally closed, and delivered or transmitted to such sheriff or other returning officer: any thing hereinbefore contained to the contrary notwithstanding.

LXXI. From and after the end of this present parliament, all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates, and the same shall be erected by contract with the candidates, if they shall think fit to make such contract, or if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer, at the expense of the several candidates as aforesaid, subject to such limitation as is hereinbefore next mentioned; (that is to say,) that the expense to be incurred for the booth or booths to be erected at the principal place of election for any county, riding, parts, or division of a county, or at any of the polling places so to be appointed as aforesaid, shall not exceed the sum of forty pounds, in respect of any one such principal place of election, or any one such polling place; and that the expense to be incurred for any booth or booths to be erected for any parish, district, or part of any city or borough shall not exceed the sum of twenty-five pounds in respect of one such parish, district, or part: and that all deputies appointed by the sheriff or other returning officer, shall be paid each two guineas by the day, and all clerks employed in taking the poll, shall be paid each one guinea by the day, at the expense of the candidates at such election: provided always, that if any person shall be proposed without his consent, then the person so proposing him shall be liable to defray his share of the said expenses in the like manner as if he had been a candidate: provided also, that the sheriff or returning officer may, if he shall think fit, instead of erecting such booth or booths as aforesaid, procure, or hire, and use any houses or other buildings for the purpose of taking the poll therein, subject, always, to the same regulations, provisions, and limitations of expense as are hereinbefore mentioned with regard to booths for taking the poll.

LXXII. The sheriff or other returning officer shall, before the day fixed for the election, cause to be made, for the use of each booth or other polling place at such election, a true copy of the register of voters, and shall, under his hand, certify every such copy to be true.

LXXIII. Every deputy of a sheriff or other returning officer, shall have the same power of administering the oaths and affirmations required by law, and of appointing commissioners for administering such oaths and affirmations as may, by law, be administered by commissioners, as the sheriff or other returning officer has by virtue of this or any other act, and subject to the same regulations and provisions in every other respect, as such sheriff or other returning officer.

LXXIV. From and after the end of this present parliament, every person who shall have a right to vote in the election of a member for the borough of Monmouth, in respect of the towns of Newport or Usk, shall give his vote at Newport or Usk respectively, before the deputy for each of such towns, whom the returning officer of the borough of Monmouth is hereby authorized and required to appoint: and every person who shall have a right to vote

in the election of a member for any shire-town or borough, in respect of any place named in the first column of schedule E, shall give his vote at such place before the deputy for such place, whom the returning officer of the shire-town or borough, is hereby authorized and required to appoint: and any person who shall have a right to vote in the election of a member for the borough composed of the towns of Swansea, Loughor, Neath, Aberavon, and Kenfig, shall give his vote at the town in respect of which he shall be entitled to vote, (that is to say,) at Swansea, before the portreeve of Swansea, and at each of the other towns before the deputy of such town, whom the said portreeve is hereby authorized and required to appoint: and at every contested election for the borough of Monmouth, or for any shire, town, or borough named in the second column of the said schedule E, or for the borough composed of the said five towns, or for the borough of Brecon, the polling shall commence on the day next after the day fixed for the respective election, unless such next day should be Saturday or Sunday, and then on the Monday following, as well at Monmouth as at Newport and Usk respectively, and as well at the shire-town or borough, as at each of the places sharing in the election therewith respectively, and as well at Swansea as at each of the four other towns respectively: and such polling shall continue for two days only, such two days being successive days, (that is to say,) for seven hours on the first day of polling, and for eight hours on the second day of polling, and that the poll shall, on no account, be kept open later than four o'clock in the afternoon of such second day: and the returning officer of the borough of Monmouth shall give to the deputies for Newport and Usk respectively, and the returning officer of any shire-town or borough named in the second column of the said schedule E, shall give to the deputy for each of the places sharing in the election for such shire-town or borough, notice of the day fixed for such respective election, and shall, before the day fixed for such respective election, cause to be made and to be delivered, to every such deputy, a true copy of the register of voters for the borough of Monmouth, or for such shire-town or borough, as the case may be, and shall, under his hand, certify every such copy to be true: and the portreeve of the town of Swansea shall give notice of the day of election to the deputy for each of the towns of Loughor, Neath, Aberavon, and Kenfig, and shall, in like manner, cause to be made and delivered to every such deputy, a true and certified copy of the register of voters for the borough composed of the said five towns; and the respective deputies for Newport and Usk, and for the respective places named in the first column of the said schedule E, as well as for the towns of Loughor, Neath, Aberavon, and Kenfig, shall respectively take and conduct the poll, and deliver and transmit the poll books in the same manner as the deputies of the returning officers of the cities and boroughs in England are hereinbefore directed to do, and shall have the same powers and perform the same duties, in every respect, as are respectively conferred and imposed on the said deputies by this act: provided always, that where there shall be a mayor, portreeve, or other chief municipal officer in any town or place for which the returning officer or the portreeve of Swansea is required to appoint a deputy as aforesaid, such returning officer or the portreeve of Swansea, as the case may be, is hereby required to appoint such chief municipal officer for the time being, to be such deputy for such town or place.

LXXXV. All laws, statutes, and usages now in force respecting the election of members to serve in parliament, for that part of the united kingdom called England and Wales, shall be and remain, and are hereby declared to be and remain, in full force, and shall apply to the election of members to serve in parliament for all the counties, ridings, parts, and divisions of counties, cities, and boroughs hereby empowered to return members, as fully and effectually as if the same respectively had heretofore returned members, except so far as any of the said laws, statutes, or usages are repealed or altered by this act, or are inconsistent with the provisions thereof.

LXXXVI. If any sheriff, returning officer, barrister, overseer, or any person whatsoever, shall wilfully contravene or disobey the provisions of this act or any of them, with respect to any matter or thing which such sheriff, returning officer, barrister, overseer, or other person is hereby required to do, he shall, for such his offence, be liable to be sued in an action of debt in any of his majesty's courts of record at Westminster, for the penal sum of five hundred pounds, and the jury before whom such action shall be tried, may find their verdict for the full sum of five hundred pounds, or for any less sum which the said jury shall think it just

that he should pay for such his offence : and the defendant in such action, being convicted shall pay such penal sum so awarded, with full costs of suit, to the party who may sue for the same : provided always, that no such action shall be brought except by a person being an elector, or claiming to be an elector, or a candidate, or a member actually returned or other party aggrieved : provided also, that the remedy hereby given against the returning officer shall not be construed to supersede any remedy or action against him, according to the law now in force.

**LXXVII.** All writs to be issued for the election of Members, to serve in all future parliaments, and all mandates, precepts, instruments, proceedings, and notices consequent upon such writs, shall be, and the same are, hereby authorized to be framed and expressed in such manner and form, as may be necessary for the carrying the provisions of this act into effect.

**LXXVIII.** Provided always, that nothing in this act contained shall extend to, or in any wise affect, the election of members to serve in parliament, for the universities of Oxford or Cambridge, or shall entitle any person to vote in the election of members to serve in parliament for the city of Oxford or town of Cambridge, in respect of the occupation of any chambers or premises in any of the colleges or halls of the universities of Oxford or Cambridge.

**LXXIX.** Throughout this act, wherever the words "city or borough," "cities or boroughs," may occur, those words shall be construed to include, except there be something in the subject or context manifestly repugnant to such construction, all towns corporate, cinque ports, districts, or places within England and Wales which shall be entitled, after this act shall have passed, to return a member or members to serve in parliament, other than counties at large, and ridings, parts, and divisions of counties at large, and shall also include the town of Berwick-upon-Tweed ; and the words "returning officer," shall apply to every person or persons to whom, by virtue of his or their office, either under the present act, or under any former law, custom, or statute, the execution of any writ or precept doth or shall belong for the election of a member or members to serve in parliament, by whatever name or title such person or persons may be called ; and the words "parish or township," shall extend to every parish, township, ville, hamlet, district, or place maintaining its own poor ; and the words "overseers of the poor," shall extend to all persons who, by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed, and that all matters by this act directed to be done by the overseers of a parish or township may be lawfully done by the major part of such overseers, and that wherever any notice is by this act required to be given to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business, or shall be sent by the post, addressed by a sufficient direction to the overseers of the particular parish or township, or to any one of them, either by their or his christian name and surname, or by their or his name of office ; and that all provisions in this act, relative to any matters to be done by or with regard to justices of the peace for counties, or sessions of the peace for counties, or clerks of the peace for counties, or treasurers of counties, shall extend to the justices, sessions, clerks of the peace, and treasurers of the several ridings of Yorkshire, and parts of Lincolnshire ; and that the clerk of the peace for the time being for the borough of Newport, in the Isle of Wight, shall, for the purposes of this act, be deemed and taken to be the clerk of the peace for the county of the Isle of Wight ; and that all the said respective justices, sessions, and clerks of the peace, shall have power to do the several matters required by this act, as well within places of exclusive jurisdiction as without ; and that no misnomer, or inaccurate description of any person or place named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act, with respect to such person or place, provided that such person or place shall be so designated in such schedule, list, register, or notice, as to be commonly understood.

**LXXX.** And whereas it may happen that the act or acts for settling the boundaries of cities, boroughs, and other places, and the divisions of counties, as hereinbefore mentioned,

may not be passed within such time as will allow the several provisions of this act relative to the lists of voters, within such respective boundaries and divisions, and the various notices and proceedings preparatory to and connected with such lists, to be carried into effect within the several periods in the present year, hereinbefore specified and limited in that behalf; and it is, therefore, expedient in such event as aforesaid, to appoint other periods for the purposes aforesaid; be it therefore enacted, that if the act or acts for settling the boundaries and divisions hereinbefore mentioned, shall not be passed before the twentieth day of June in the present year, then, and in such case, the notice hereinbefore required to be given on the said twentieth day of June, shall not be given on that day, and the lists of voters, and the notices and other proceedings preparatory to and connected with such lists shall not be made out, given, or had upon or within the several days or times in the present year, hereinbefore specified in that behalf; but if the act or acts for settling the boundaries of cities, boroughs, and other places, and the divisions of counties, as hereinbefore mentioned, shall be passed in the present year subsequently to the twentieth day of June, then, and in such case, his majesty shall, by an order made with the advice of his most honourable privy council, appoint in lieu of the day for the present year hereinbefore specified in that behalf, a certain other day, before or upon which the respective lists of voters shall be made out, and shall also appoint, in lieu of the several days and times for the present year, hereinbefore specified or limited in that behalf, certain other days and times upon or within which all notices, claims, objections, and other matters whatsoever by this act required to be given, delivered, transmitted, done, or performed in relation to such lists, either before or after the making out of such lists, shall be respectively given, delivered, transmitted, done, and performed; and his majesty shall also, by such order, appoint, in lieu of the period for the present year, hereinbefore limited in that behalf, a certain other period for the revision of the respective lists of voters by the barristers, and shall also appoint, within what time, in lieu of the time for the present year, hereinbefore limited in that behalf, such respective lists shall be copied out into books, and, when necessary, delivered to the sheriff or under-sheriff, and from what day, in lieu of the day for the present year hereinbefore specified in that behalf, such respective books shall begin to be in force as the registers of voters; and his majesty may also, by such order in council, appoint any days and times for doing the several other matters required or authorized by this act, in lieu of the several days and times for the present year hereinbefore specified; and all days and times so appointed by his majesty, as aforesaid, shall be deemed to be of the same force and effect as if they had in every instance been mentioned in this act, in lieu of the days and times for the present year hereinbefore specified in that behalf: provided always, that nothing herein contained shall authorize his majesty to appoint any days or times in lieu of the days and times mentioned in this act, except for the purpose of carrying into effect the first registration of voters under this act: provided also, that no person shall be entitled to be included in such first registration of voters, unless he would have been entitled on the last day of July in the present year to have his name inserted in some list of voters, if such list had been made out on the said last day of July.

LXXXI. Provided always, that if a dissolution of the present parliament shall take place after the passing of this act, and after the passing of the act or acts for settling the boundaries of cities, boroughs, and other places, and the divisions of counties, as hereinbefore mentioned, but before the day at and from which the registers of voters to be first made by virtue of this act shall begin to be in force, in such case such persons only shall be entitled to vote in the election of members to serve in a new parliament for any county, riding, parts, or division of a county, or for any city or borough as would be entitled to be inserted in the respective lists of voters for the same directed to be made under this act, if the day of election had been the day for making out such respective lists; and such persons shall be entitled to vote in such election, although they may not have been registered according to the provisions of this act, any thing herein contained notwithstanding; and the polling at such election for any county, riding, parts, or division of a county, may be continued for fifteen days, and the polling at such election for any city or borough may be continued for eight days, any thing herein contained notwithstanding.

LXXXII. Provided also, that if a dissolution of the present parliament shall take place



after the passing of this act, and before the passing of the act or acts for settling respectively the boundaries of cities, boroughs, and other places, and the divisions of counties as hereinbefore mentioned, then, and in such case, the election of members to serve in a new parliament shall, both as to the persons entitled to vote and otherwise, be regulated according to the provisions of this act, save and except as hereinbefore mentioned; (that is to say,) that as to the several counties enumerated in schedule F, all persons entitled by virtue of this act, in respect of property therein, to vote in the election of knights of the shire, shall be entitled to vote for four knights of the shire to serve in such new parliament for each of the said counties, and not for two knights to serve for any division of the said counties; and that as to the several boroughs enumerated in schedules C and D, each of the said boroughs shall, for the purpose of electing a member or members to serve in such new parliament, be deemed to include such places as are specified and described in conjunction with the name of each of the said boroughs in schedule L; and that as to the several cities and boroughs in England and Wales, not included in schedule A, and now returning a member or members to serve in parliament, and the places sharing in the election for such cities and boroughs, each of such cities, boroughs, and places respectively, shall, for the purpose of electing a member or members to serve in such new parliament as aforesaid, be deemed to be comprehended within the same limits as before the passing of this act, and not otherwise; and that no place named in the first column of schedule E, which before the passing of this act did not share in the election of a member for any shire, town, or borough named in the second column of the said schedule E, shall share in the election of a member for any shire, town, or borough to serve in such new parliament, any thing hereinbefore contained to the contrary notwithstanding; and that the borough composed of Swansea, Lougher, Neath, Aberavon, and Kenfig shall not return a member to serve in such new parliament, but shall, instead thereof, share in the election of a member to serve in such new parliament for the borough of Cardiff, any thing hereinbefore contained to the contrary notwithstanding; and that in the event of such dissolution of parliament so taking place as last aforesaid, such persons only shall be entitled to vote in the election of members to serve in such new parliament as aforesaid, for the counties, ridings, parts, cities, and boroughs, which, in such event, shall return members to serve in such new parliament as would be entitled to be inserted in the respective list of voters directed to be made under this act, if the day of election had been the day for making out such respective lists; and such persons shall be entitled to vote in such election, although they may not be registered according to the provisions of this act, any thing hereinbefore contained to the contrary notwithstanding; and the polling for such election for any county, or for any riding of Yorkshire, or parts of Lincolnshire, may be continued for fifteen days, and the polling at such election for any city or borough may be continued for eight days, any thing hereinbefore contained to the contrary notwithstanding.

#### SCHEDULES TO WHICH THE FOREGOING ACT REFERS.

##### SCHEDULE A.

Boroughs.	County.	Boroughs.	County.
Old Sarum	Wiltshire	West Looe	Cornwall
Newtown	Isle of Wight	St Germans	Cornwall
St Michaels, or Mid-		Newport	Cornwall
hall	Cornwall	Blechingly	Surrey
Gatton	Surry	Aldborough	Yorkshire
Bramber	Sussex	Camelford	Cornwall
Bosminy	Cornwall	Hindon	Wiltshire
Dunwich	Suffolk	East Looe	Cornwall
Ludgershall	Wiltshire	Corfe Castle	Dorsetshire
St Mawes	Cornwall	Great Bedwin	Wiltshire
Beeralston	Devonshire	Yarmouth	Hampshire

Boroughs.	County.	Boroughs.	County.
Queenborough	Kent	Plympton	Devonshire
Castle Rising	Norfolk	Seaford	Sussex
East Grinstead	Sussex	Heytesbury	Wiltshire
Higham Ferrers	Northamptonshire	Steyning	Sussex
Wendover	Buckinghamshire	Whitchurch	Hampshire
Woolby	Herefordshire	Wootton Bassett	Wiltshire
Winchelsea	Sussex	Downton	Wiltshire
Trigony	Cornwall	Fowey	Cornwall
Haslemere	Surrey	Milbourne Port	Somersetshire
Saltaah	Cornwall	Aldburgh	Suffolk
Orford	Suffolk	Minhead	Somersetshire
Callington	Cornwall	Bishop's Castle	Shropshire
Newton	Lancashire	Okehampton	Devonshire
Ilchester	Somersetshire	Appleby	Westmoreland
Boroughbridge	Yorkshire	Lostwitheli	Cornwall
Stockbridge	Hampshire	Brackley	Northamptonshire
New Romney	Kent	Amersham	Buckinghamshire
Hedon	Yorkshire		

## SCHEDULE B.

Boroughs.	County.	Boroughs.	County.
Petersfield	Hampshire	Reigate	Surrey
Ashburton	Devonshire	Hythe	Kent
Eye	Suffolk	Droghda	Worcestershire
Wootbury	Wiltshire	Lyme Regis	Dorsetshire
Wareham	Dorsetshire	Launceston	Cornwall
Shaftesbury	Dorsetshire	Calne	Wiltshire
Thirsk	Yorkshire	Arundel	Sussex
Christchurch	Hampshire	St Ives	Cornwall
Horsham	Sussex	Rye	Sussex
Great Grimsby	Lincolnshire	Clitheroe	Lancashire
Midhurst	Sussex	Morpeth	Northumberland
Woodstock	Oxfordshire	Hilston	Cornwall
Wilton	Wiltshire	North Allerton	Yorkshire
Malmesbury	Wiltshire	Wallingford	Berkshire
Liskeard	Cornwall	Dartmouth	Devonshire

## SCHEDULE C.

Principal places to be Boroughs.	Counties.	Returning Officers.
Manchester	Lancashire	The boroughreeve and constables of Manchester
Birmingham	Warwickshire	The two bailiffs of Birmingham
Leeds	Yorkshire	The mayor of Leeds
Greenwich	Kent	
Sheffield	Yorkshire	The master cutler
Sunderland	Durham	
Devonport	Devonshire	
Wolverhampton	Staffordshire	Constable of the manor of the deanery of Wolverhampton
Tower Hamlets	Middlesex	
Finsbury	Middlesex	
Mary-le-bone	Middlesex	
Lambeth	Surrey	
Bolton	Lancashire	The boroughreeves of Great and Little Bolton
Bradford	Yorkshire	

Principal places to be Boroughs.	Counties.	Returning Officers.
Blackburn Brighton Halifax Macclesfield Oldham Stockport Stoke-upon-Trent Stroud	Lancashire Sussex Yorkshire Cheshire Lancashire Cheshire Staffordshire Gloucestershire	The mayor of Macclesfield  The mayor of Stockport

## SCHEDULE D.

Principal places to be Boroughs.	Counties.	Returning Officers.
Ashton-under-Line Bury Chatham Cheltenham Dudley Frome Gateshead Huddersfield Kidderminster Kendal Rochdale Salford South Shields Tynemouth Wakefield Wallsall Warrington Whitby Whitehaven Merthyr Tydvil	Lancashire Lancashire Kent Gloucestershire Worcestershire Somersetshire Durham Yorkshire Worcestershire Westmoreland Lancashire Lancashire Durham Northumberland Yorkshire Staffordshire Lancashire Yorkshire Cumberland Glamorganshire	Mayor of Ashton-under-Line       The high bailiff of Kidderminster The mayor of Kendal  The boroughreeve of Salford    The mayor of Wallsall

## SCHEDULE E.

Places sharing in the election of Members.		Shire-towns, or principal boroughs.	County.
Amlwch Holyhead Llangefni Aberystwith Lampeter Adpar Llanelly Pwllheli Nevin Conway Bangor Criccieth Ruthin Holt Town of Wrexham Rhyddlan Overton Caerwis Caergwrby St Asaph Holywell Mold Cowbridge Llantrisant	} sharing with } sharing with } sharing with } sharing with } sharing with } sharing with } sharing with	Beaumaris Cardigan Caermarthen Caernarvon Denbigh Flint Cardiff	Anglesey  Caermarthenshire Caernarvonshire Denbighshire  Flintshire Glamorganshire

Places sharing in the election of Members.	Shire, town, or principal borough.	County.
Llanidloes Welsh Pool Machynallith Llanfyllin Newtown Narberth Fishguard Tenby Wiston Town of Milford Knighton Rhayder Kevinleece Knucklas Town of Presteigne	} sharing with Montgomery } sharing with Haverford west } sharing with Pembroke } sharing with Radnor	Montgomeryshire Pembrokeshire Pembrokeshire Radnorshire

## SCHEDULE E 2.

Places sharing in the election of Members.	Places therein from which the seven miles are to be calculated.
Newport Usk Aberystwith Lampeter Adpar Pwllheli Nevin Conway Criccieth Ruthin Holt Rhyddlan Overton Caerwis Caergwrby Cowbridge Llantrissant Tenby Wiston Knighton Rhayder Kevinleece Knucklas Swansea Loughor Neath Aberavon Kenfig	The market-place The town-hall The bridge over the Rheidal The parish church Bridge over the Telvi The guildhall The parish church The parish church The castle The parish church called St Peter's The parish church The parish church The parish church The parish church The parish church of Hope The town-hall The town-hall The parish church The parish church The parish church The market-place The parish church The site of the ancient castle of Cnwglas The town-hall The parish church The town-hall The bridge over the Avon The parish church of Lower Kenfig

## SCHEDULE F.

## COUNTIES TO BE DIVIDED.

Cheshire	Gloucestershire	Northumberland	Suffolk
Cornwall	Kent	Northamptonshire	Surrey
Cumberland	Hampshire	Nottinghamshire	Sussex
Derbyshire	Lancashire	Shropshire	Warwickshire
Devonshire	Leicestershire	Somersetshire	Wiltshire
Durham	Norfolk	Staffordshire	Worcestershire
Essex			

## SCHEDULE F 2.

COUNTIES TO RETURN THREE MEMBERS EACH.

Berkshire Buckinghamshire Cambridgeshire	Dorsetshire Herefordshire	Hertfordshire Oxfordshire
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## SCHEDULE G.

Cities and towns and counties thereof.	Counties at large, in which cities and towns and counties thereof are to be included.
Caermarthen Canterbury Chester Coventry Gloucester Kingston-upon-Hull Lincoln London Newcastle-upon-Tyne Poole Worcester York and Ainsty Southampton	Caermarthenshire Kent Cheshire Warwickshire Gloucestershire East Riding of Yorkshire Ports of Lindsey, Lincolnshire Middlesex Northumberland Dorsetshire Worcestershire North Riding of Yorkshire Hampshire

## SCHEDULE H.

FORMS of LISTS and NOTICES applicable to COUNTIES.

No. I. NOTICE of the making out of the lists to be given by the overseers.

We hereby give notice, that we shall, on or before the last day of July in this year, make out a list of all persons entitled to vote in the election of a knight or knights of the shire for the county of [or for the riding, parts, or division of the county of *as the case may be,*] in respect of property situate wholly or in part within this parish [or township; and all persons so entitled, are hereby required to deliver or transmit to us, on or before the twentieth day of July in this year, a claim in writing, containing their christian name and surname, their place of abode, the nature of their qualification, and the name of the street, lane, or other like place wherein the property, in respect of which they claim to vote, is situated; and if the property be not situated in any street, lane, or other like place, then such claim must describe the property by the name by which it is usually known, or by the name of the tenant occupying the same; and each of such persons so claiming, must also, at the same time, pay to us the sum of one shilling. Persons omitting to deliver or transmit such claim, or to make such payment, will be excluded from the register of voters for this county, [or riding, parts, or division, *as the case may be.*] [In subsequent years, after one thousand eight hundred and thirty-two, add the following words, "But persons whose names are now on the register are not required to make a fresh claim, so long as they retain the same qualification, and continue in the same place of abode as described in the register."]

(Signed) A. B. } Overseers of the  
C. D. } township or  
E. F. } parish.

No. II. Notice of claim to be given to the overseers.

I hereby give you notice, that I claim to be inserted in the list of voters for the county of [or for the riding, parts, or division of the county of *as the case may be,*] and that the particulars of my place of abode and qualification are stated below. Dated the . day of . in the year .

(Signed) JOHN ADAMS.

Place of abode, Cheapside, London.

Nature of qualification, freehold house, [or warehouse, stable, land, field, annuity, rent charge, &c., *as the case may be,* giving such a description of the property as may serve to

*identify it.]* When situate in this parish [or township] King Street. *If the property be not situate in any street, lane, or other like place, then say,* "name of the property, Highfield farm," or "name of the occupying tenant, John Edwards."

## No. III.

County of \_\_\_\_\_ to wit, [or riding, parts, or division of the county of \_\_\_\_\_] } THE LIST OF PERSONS entitled to vote in the election of a knight [or knights] of the shire for the county of \_\_\_\_\_ [or for the riding, parts, or division of a county of \_\_\_\_\_] as the case may be, in respect of property situate within the parish of \_\_\_\_\_ [or township, as the case may be.]

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish [or township] where the property is situate, or name of the property, or name of the tenant.
Adams, John	Cheapside, London	Freehold house	King Street
Alley, James	Longlane in this parish	Copyhold field	John Edwards, tenant
Ball, William	Market Street, Lancaster	Lease of warehouse for years	Duke Street
Boyce, Henry	Church Street in this parish	Fifty acres of land as occupier	Highfield farm

(Signed) A. B. } Overseers of  
C. D. } parish or  
E. F. } township.

## No. IV. NOTICE of OBJECTION to be given to the OVERSEERS.

To the overseers of the parish of \_\_\_\_\_ [or township, as the case may be.]

I hereby give you notice, that I object to the name of William Ball being retained in the list of voters for the county of \_\_\_\_\_ [or for the riding, parts, or division of the county of \_\_\_\_\_]. Dated the \_\_\_\_\_ day of \_\_\_\_\_ (Signed) A. B. of [place of abode].

## No. V. NOTICE of OBJECTION to PARTIES inserted in the LIST.

To Mr William Ball.

I hereby give you notice, that I object to your name being retained in the list of voters for the county of \_\_\_\_\_ [or for the riding, parts, or division of the county of \_\_\_\_\_], and that you will be required to prove your qualification at the time of the revising of the said list. Dated the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ (Signed) A. B. [place of abode].

## No. VI. LIST of PERSONS objected to, to be published by the OVERSEERS.

The following persons have been objected to, as not being entitled to have their names retained in the list of voters for the county of \_\_\_\_\_ [or for the riding, parts, or division of the county of \_\_\_\_\_].

Christian name and surname of each person objected to.	Place of abode.	Nature of the supposed qualification.	Street, lane, or other like place in this parish [or township] where the property is situate, or name of the property, or name of the tenant.
Alley, James	Longlane in this parish	Copyhold field	John Edwards, tenant
Ball, William	Market Street, Lancaster	Lease of warehouse for years	Duke Street

(Signed) A. B. } Overseers of the parish  
C. D. } of [or township, as the case may be].  
E. F. }

## SCHEDULE I.

## FORMS of LISTS and NOTICES applicable to CITIES and BOROUGHs.

No. I. The LIST of persons entitled to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_ in respect of property occupied within the parish [or township] of \_\_\_\_\_ by virtue of an act passed in the second year of the reign of king William the Fourth, intituled, "An act to amend the representation of the people in England and Wales."

Christian name and surname of each voter at full length.	Nature of qualification.	Street, lane, or other place in this parish where the property is situate.
Ashton, John Atkinson, William Bates, Thomas Bull, Thomas	House Warehouse Shop Counting-house	Church Street Bolt Court, Fleet Street Castle Street Lord Street

(Signed) A. B. } Overseers of the  
C. D. } said parish (or  
E. F. } township).

No. II. THE LIST of all PERSONS (not being freemen) entitled to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_ in respect of any rights other than those conferred by an act passed in the second year of king William the Fourth, intituled, "An act to amend the representation of the people in England and Wales."

Christian name and surname of each voter at full length.	Nature of qualification.	Street, lane, or other place in this parish where the property is situate. <i>If the right of voting does not depend on property, then state the place of abode.</i>

(Signed) A. B. } Overseers of the parish of  
C. D. } [or township] within the said city  
E. F. } [or borough].

No. III. THE LIST of the FREEMEN of the city [or borough] of \_\_\_\_\_ [or of being a place sharing in the election with the city [or borough] of \_\_\_\_\_], entitled to vote in the election of a member [or members] for the said city [or

Christian name and surname of each freeman at full length.	Place of his abode.

(Signed) A. B. } Town clerk of the city  
[or borough or place].

## No. IV. NOTICE of CLAIM.

To the overseers of the parish [or township] of \_\_\_\_\_ or to the town clerk of the city [or borough] of \_\_\_\_\_ or otherwise, as the case may be].

I hereby give you notice, that I claim to have my name inserted in the list made by you of persons entitled to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_ and that my qualification consists of a house in Duke Street in your parish, or otherwise, [as the case may be]; [and in case of a freeman, say, and that my qualification is as a freeman of \_\_\_\_\_ and that I reside in Lord Street in this city or borough]. Dated the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred and thirty \_\_\_\_\_

(Signed) JOHN ALLEN, [place of abode].

## No. V. NOTICE of OBJECTION.

To the overseers of the parish [or township] of \_\_\_\_\_ [or to the town clerk of the city [or borough] of \_\_\_\_\_ or otherwise, as the case may be].

I hereby give you notice, that I object to the name of Thomas Bates being retained in the list of persons entitled to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_ and that I shall bring forward such objection at the time of the revising of such list. Dated the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

(Signed) A. B. [place of abode].

## No. VI. LIST of CLAIMANTS to be published by the OVERSEERS.

The following persons claim to have their names inserted in the list of persons entitled to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_

Christian name and surname of each claimant at full length.	Nature of qualification.	Street, lane, or other place in this parish where the property is situate. If the right does not depend on property, state the place of abode.
Allen, John	House	Duke Street

(Signed) A. B. }  
C. D. } Overseers of, &c.  
E. F. }

## No. VII. LIST of PERSONS objected to, to be published by the OVERSEERS.

The following persons have been objected to, as not being entitled to have their names retained in the list of persons qualified to vote in the election of a member [or members] for the city [or borough] of \_\_\_\_\_

Christian name and surname of each person objected to.	Nature of the supposed qualification.	Street, lane, or other place in this parish where the property is situate. If the right does not depend on property, state the place of abode.
Bates, Thomas	Shop	Castle Street

(Signed) A. B. }  
C. D. } Overseers of, &c.  
E. F. }

## No. VIII. LIST of CLAIMANTS to be published by the TOWN CLERKS.

The following persons claim to have their names inserted in the list of freemen of the city [or borough] of \_\_\_\_\_ [or of \_\_\_\_\_ being a place sharing in the election with the city [or borough] of \_\_\_\_\_], entitled to vote in the election of a member [or members] for the said city [or borough].



Christian name and surname of each claimant at full length.	Place of his abode.

(Signed) A. B. } Town clerk of the said city  
[or borough or place].

No. IX. THE LIST of PERSONS objected to, to be published by the TOWN CLERKS.

The following persons have been objected to, as having no right to be retained on the list of the freemen of the city [or borough] of [or of] being a place sharing in the election with the city [or borough] of ], entitled to vote in the election of a member [or members] for the said [city or borough].

Christian name and surname of each person objected to.	Place of his abode.

(Signed) A. B. } Town clerk of the said city  
[or borough or place].

#### SCHEDULE K. •

A LIST of such of the FREEMEN of LONDON as are LIVERYMEN of the COMPANY of entitled to vote in the election of members for the CITY of LONDON.

Christian name and surname of the voter at full length.	Street, lane, or other description of his place of abode.

(Signed) A. B., Clerk.

No. I. NOTICE of CLAIM to be given to the RETURNING OFFICER or OFFICERS of the CITY of LONDON, and to the CLERKS of the respective LIVERY COMPANIES.

To the returning officer or officers of the city of London, [or to the clerk of the company of ].

I hereby give you notice, that I claim to have my name inserted in the list made by the clerk of the company of [or in case of notice to the clerk, say, made by you.] of the liverymen of the said company, [or in case of notice to the clerk, say, of the liverymen of the company of ], entitled to vote in the election of members for the city of London. Dated the day of

(Signed) A. B. } [Place of abode.  
Name of Company].

No. II. LIST of CLAIMANTS to be published by the RETURNING OFFICER or OFFICERS of the CITY of LONDON.

The following persons claim to have their names inserted in the list of persons entitled to vote as freemen of the city of London, and liverymen of the several companies, being specified in the election of members for the city of London.

Christian name and surname of claimants at full length.	Place of abode.

No. III. NOTICE OF OBJECTION TO PARTIES INSERTED IN THE LIST OF THE LIVERY.

To Mr William Baker,

I hereby give you notice, that I object to your name being retained in the list of persons entitled to vote as freemen of the city of London, and liverymen of the company of  
in the election of members for the said city, and that I shall bring forward such objection at the time of revising the said lists. Dated the       day of  
(Signed)       A. B., [Place of abode].

SCHEDULE L.

Boroughs.	Temporary Contents, and Boundary.
Ashton-under-Line.	The division of the parish of Ashton-under-Line, called the town's division.
Birmingham.	Parishes of Birmingham and Edgbarton, and townships of Bordesley, Edgbaston, and Duddistun, with Nechels.
Blackburn.	Township of Blackburn.
Bolton.	Townships of Great Bolton, Haulgh, and Little Bolton, except the detached part of the township of Little Bolton, which lies to the north of the town of Bolton.
Bradford.	Township of Bradford.
Brighthelmston.	Parishes of Brighthelmston and Hore.
Bury.	Township of Bury.
Chatham.	From the easternmost point at which the boundary of the city of Rochester meets the right bank of the river Medway, southward along the boundary of the city of Rochester to the boundary stone of the said city marked 5; thence in a straight line to the windmill in the parish of Chatham, on the top of Chatham hill; thence in a straight line to the oil windmill in the parish of Gillingham, between the village of Gillingham and the fortifications; thence in a straight line through Gillingham fort to the right bank of the river Medway; thence along the right bank of the river Medway to the point first described.
Cheltenham.	Parish of Cheltenham.
Davenport.	Parish of Stoke Damervill, and township of east Stonehouse.
Dudley.	Parish of Dudley.
Finsbury.	Parishes of St Giles in the Fields; St George, Bloomsbury; St George the Martyr; St Andrew above bars; St Luke; St Sepulchres, except so much as is in the city of London; St James, Clerkenwell, except so much as is locally in the parish of Hornsey; ecclesiastical districts of Trinity; St Paul and St Mary, in the parish of St Mary, Islington; Liberties of Saffron Hill, Hatton Garden, and Ely Kents; Ely Place; the Rolls; Glasshouse Yard; precinct of the Charter house; Lincoln's Inn; Gray's Inn; so much of Furnival's Inn and Staples Inn as is not within the city of London.
Frome.	Town of Frome, as within the limits now assigned to the town of Frome by the trustees, under the provisions of an act passed in the first and second year of his present majesty, intitled "An act for better repairing and improving several roads leading to and from the town of Frome, in the county of Somerset."
Gateshead.	Parish of Gateshead.

Boroughs.	Temporary Contents, and Boundary.
Greenwich.	Parishes of St Paul and St Nicolas, Deptford, and so much of the parishes of Greenwich, Charlton, and Woolwich, as lie between the Thames and the Dover road.
Halifax.	Township of Halifax.
Huddersfield.	Township of Huddersfield.
Kendal.	Townships of Kendal and Kirkland, all such parts of the township of Nethergaveship as adjoin the township of Kendal.
Kidderminster.	Borough of Kidderminster.
Lambeth.	Parishes of St Mary, Newington; St Giles, Cumberwell, except the manor and hamlet of Dulwich; precinct of the Palace; and so much of the parish of Lambeth as is north of the ecclesiastical division of Brixton.
Leeds.	Borough of Leeds.
Macclesfield.	Borough of Macclesfield.
Manchester.	Townships of Manchester, Chorlton Row, Ardwick, Hulme, Beswick, Chatham, Bradford, Newton, and Harpur Hey.
Mary-le-bone.	Parishes of St Mary-le-bone and Paddington, and so much of the parish of St Pancras as is south of the Regent's Canal.
Merthyr Tydvil.	Parishes of Merthyr Tydvil and Alerdwn.
Oldham.	Township of Oldham.
Rochdale.	Town of Rochdale, as within the provisions of an act passed in the sixth year of his late majesty, intituled "An act for lighting and regulating the town of Rochdale, in the county palatine of Lancaster."
Salford.	Townships of Salford, Pendleton, and Broughton.
Sheffield.	Townships of Sheffield, Attercliffe-cum-Darnall, Brightside, Burlow, and Nether Hallam.
South Shields.	Townships of South Shields and Westoe.
Stockport.	Borough of Stockport; hamlets of Bricksaway and Edgeley.
Stoke-upon-Trent.	Townships of Tunstall, Barslem, Hanley, Shelton, Penkhull with Boothem, Lane End, Longton, Fenton Vivian, Fenton Culvert, hamlet of Sneyd, and ville of Rushton Grange.
Stroud.	Parishes of Stroud, Bisley, Painswick, Pitchcomb, Randwick, Stonehouse, Eastington, Leonard Stanley, except Lorriddges farm; King's Stanley, Rodborough, Minchinhampton, Woodchester, Avening, Horsley.
Sunderland.	Parish of Sunderland; townships of Bishop Wearmouth, Bishop Wearmouth Panns, Monk Wearmouth, Monk Wearmouth Shore, and Southwick.
Tower Hamlets.	Liberties of the Tower, and tower division of Ossulston Hundred, except the parishes of St John, Hackney; St Mary Stratford-le-Bow, and St Leonard Bromley.
Tynemouth.	Townships of Tynemouth, North Shields, Chirton, Preston, and Cuillercoats.
Wakefield.	Township of Wakefield.
Walsall.	Borough of Walsall, except the parts detached from the borough of Walsall.
Warrington.	Township of Warrington.
Whitehaven.	Township of Whitehaven.
Whitby.	Township of Whitby.
Wolverhampton.	Townships of Wolverhampton, Bilston, Widnesfield, and Willenhall, and parish of Sedgely.

Soon after the act to amend the representation of the people in England and Wales received the royal assent, a bill was introduced to amend the representation of the people of Scotland, which finally passed, and received its completion by the king, on the 17th July, 1832. Since the union of the two kingdoms, when the representation of the kingdom of Scotland was settled, as it was supposed at that time definitively, the privilege of electing the members of parliament was exclusively confined to the magistrates and members of the town councils of the different burghs,

and the freeholders of the counties. When the system of burgh election was instituted, the artificers belonging to the seven incorporated trades each chose a representative, as a burgh councillor, who were supposed to represent the great mass of the people, and the provost and baillies the upper classes, in these burghs; by which means it was intended that these delegates of the people should elect a member to serve in parliament, agreeable to the wishes of their own constituents. From the change that took place in the nature of society, the civic councillors ceased to be the representatives of any class of their fellow townsmen but the members of their own incorporation, who were comparatively few in number; and, consequently, their election of members of parliament was less the act of the people than of these corporations. The new act, however, set aside the powers of the corporations, and conferred the elective franchise in the burghs on every male of full age, not legally incapacitated, who pays a rent of £10, and has qualified, by paying the assessed taxes on or before the 20th of July in all future years.

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AN ACT TO AMEND THE REPRESENTATION OF THE PEOPLE  
IN SCOTLAND.

WHEREAS the laws which regulate the election of members to serve in the commons house of parliament for Scotland are defective, whereby great inconveniences and abuses have been occasioned: and whereas it is expedient, and would be for the evident utility of the subjects within Scotland, that those defects should be remedied, and especially that members should be provided for places hitherto unrepresented, and the right of election extended to persons of property and intelligence, and that the mode of conducting elections should be better regulated and ordered: be it therefore enacted by the king's most excellent majesty, by, and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the end of this present parliament, and in all future parliaments to be assembled, there shall be fifty-three representatives returned for Scotland to the commons house of parliament, of whom thirty shall be for the several or conjoined shires or stewartries hereinafter enumerated, and twenty-three for the several cities, burghs, and towns, or districts of cities, burghs, and towns, hereinafter enumerated or described.

II. And be it enacted, that after the end of this present parliament, the burghs of Peebles and Selkirk shall no longer form parts of the district to which they now belong, or be entitled to contribute with any other burghs in the election of any member of parliament, but shall, in the matter of elections, be held to be parts of the counties of Peebles and Selkirk respectively; and in like manner that the burgh of Rothesay, in the county of Bute, shall no longer form part of the district to which it now belongs, but be held, in the matter of elections, to be part of the county of Bute.

III. Of the thirty members hereafter to be returned to parliament by the separate or combined shires of Scotland, one shall always be returned by each of the separate shires, or parts of shires, enumerated in the schedule (A.) hereunto annexed, and one by each two of the combined shires or parts of shires enumerated and described in schedule (B.): provided always, that all properties lying locally within the limits of any county or shire, though hitherto constituting part of some other county, shall, for the purposes of this act, be held to be part of the county within which they are locally included.

IV. Of the twenty-three members to be returned for the several or combined cities, burghs, and towns of Scotland, two shall always be returned by each of the separate cities, burghs, and towns enumerated and described in schedule (C.), one by each of the separate

cities, burghs, and towns enumerated and described in schedule (D.), and one by each of the districts or sets of cities, burghs, and towns enumerated and described in schedule (E.).

V. The limits and boundaries of all the cities, burghs, and towns enumerated in any of the above-mentioned schedules, shall, for the purposes of this act, be taken and held to be according to the description and specification of such limits and boundaries set forth and contained in schedule (M.); and all the properties within the boundaries therein specified shall hereafter, for the purposes of this act, be parts of the said cities, burghs, and towns, and not of the adjoining or of any other county: provided always, that the following rules shall be observed in the construction of the several descriptions of boundaries contained in the said schedule (M.); that is to say,—1. That the words “Northward,” “Southward,” “Eastward,” “Westward,” shall respectively be understood to denote only the general direction in which any boundary proceeds from the point last described, and not that such boundary shall continue to proceed throughout in the same direction to the point next described:—2. That when any road is mentioned merely by the name of the place to which such road leads, the principal road thither from the city, burgh, or town, of which the boundary is in course of description shall be understood:—3. That whenever a line is said to be drawn from, to, through, or in the direction of, or any distance to be measured from or to, an object, such line shall, in the absence of any direction to the contrary, be understood to be drawn from, to, through, or in the direction of, or such distance to be measured from or to, the centre of such object, as nearly as the centre thereof can be ascertained:—4. That every building through which or through any part whereof any boundary hereby established shall pass, shall be considered as within such boundary: provided always, that if the boundaries of any two or more of the cities, burghs, and towns, whereof the boundaries are hereby described, shall pass through the same building, or any part thereof, such building shall be considered as within that one of such two or more of the said cities, burghs, and towns, which was before the passing of this act entitled to return members or a member to serve in parliament; or if neither or more than one of such two or more of the said cities, burghs, and towns shall have been so entitled, then within that one of them whereof the area as hereby established is the smallest:—5. That whenever any boundary by this act established is said to pass, or any distance to be measured, along any street, road, lane, or loaning; or up, down, or along any river, stream, canal, or burn; the middle (as nearly as the same can be ascertained) of such street, road, lane, loaning, river, stream, canal, or burn, shall be understood:—6. That the middle of any street, road, or lane shall be understood as the middle of the carriage-way along the same:—7. That when any boundary by this act established is said to proceed, or any distance to be measured, along a street, road, or lane, or up, down, or along a river, from or to an object, such boundary shall be understood to proceed, or such distance to be measured (as the case may be), from or to that point in the middle of such road, lane, or river, from which the shortest line would be drawn to the centre of such object, as nearly as the centre thereof can be ascertained:—8. That the point at which any wall, march, boundary, street, road, lane, loaning, avenue, railway, walk, path, river, stream, canal, or burn is said to meet, join, cross, reach, or leave any march, boundary, street, road, lane, loaning, avenue, railway, walk, river, stream, canal, or burn, shall be understood as that point at which a line passing along the middle of the march, boundary, &c., so met, joined, crossed, reached, or left, would be intersected by a line drawn along the middle of the wall, march, boundary, &c., so meeting, joining, crossing, reaching, or leaving, if such line were prolonged sufficiently far; and that the point at which any burn or river joins any firth or the sea, shall be understood as that point at which a line passing along the low-water mark of such firth or the sea would be cut by a line to be drawn along the middle of such burn or river, if such line were prolonged sufficiently far; and that the point at which a burn or feeder joins a loch shall be understood as that point at which a line drawn along the shore of such loch would be cut by a line drawn thereto along the middle of such burn or feeder:—9. That when a line is said to be drawn to a road, lane, river, stream, or canal, such line shall be considered as prolonged to the middle of such road, lane, river, stream, or canal:—10. That the words “sea” and “shore” shall be understood the low-water mark:—11. That if any deficiency shall be found to exist in the line of any boundary described in the said schedule to this act annexed, by reason of the intervention of any space between any

two immediately consecutive points, such deficiency shall be supplied by a straight line to be drawn from the one to the other of such two immediately consecutive points.

VI. From and after the passing of this act, no person shall acquire, by succession, purchase, gift, or otherwise, the right of voting for a member of parliament, either in shires, or in cities, burghs, or towns, except by one or other of the qualifications hereinafter prescribed and directed: provided always, that all persons who at the passing of this act shall be lawfully on the roll of freeholders of any shire in Scotland, or who shall then be entitled to be put on such roll, or who shall, previous to the first day of March, 1831, have become the owners or superiors of lands affording the qualification for being so enrolled, shall, so long as they retain the necessary qualification on which they are now enrolled, or are entitled to be enrolled, as aforesaid, be entitled to be registered and to vote as hereinafter directed in the election of a member for such shire.

VII. From and after the passing of this act, every person, not subject to any legal incapacity, shall be entitled to be registered as hereinafter directed, and thereafter to vote at any election for a shire in Scotland, who, when the sheriff proceeds to consider his claim for registration, in the present or in any future year, shall have been, for a period of not less than six calendar months next previous to the last day of August in the present or the last day of July in any future year, the owner (whether he has made up his titles, or is infeft, or not,) of any lands, houses, feu duties, or other heritable subjects, (except debts heritably secured,) within the said shire; provided the subject or subjects on which he so claims shall be of the yearly value of ten pounds, and shall actually yield or be capable of yielding that value to the claimant, after deducting any feu duty, ground annual, or other consideration which he may be bound to pay or to give or account for as a condition of his right, provided he be, by himself, his tenants, vassals, or others, in possession of the said subjects, and be either himself in the actual occupation or in receipt of the profits and issues thereof to the extent above mentioned: provided always, that where the whole profits and issues of any such subject do not arise annually, but at longer intervals, the worth and amount of such occasional profits shall be taken into computation in estimating the annual value: provided also, that where any property which would entitle the owner to be registered and to vote as above, shall come to any person, within the said period of six months, by inheritance, marriage, marriage settlement, or *mortis causa* disposition, or by appointment to any place or office, such person shall be entitled to be registered on the first occasion of making up the list of voters, as hereinafter provided, next following such succession or acquisition.

VIII. In elections for shires, where two or more persons are interested in any subject to which a right of voting is for the first time attached by this act, as life-renter and as fiar, the right of voting shall be in the life-renter, and not in the fiar; and all co-proprietors or joint owners shall be entitled each to vote in respect of their joint property within the shire, provided the share of interest of each joint owner so claiming on such property is of the yearly value of ten pounds, as above specified, but not otherwise: provided also, that husbands shall be entitled to vote in respect of property belonging to their wives, or owned or possessed by such husbands after the death of their wives by the courtesy of Scotland.

IX. Tenants in lands, houses, or other heritable subjects shall also be entitled to be registered, and to vote at elections for the shires in which the said heritable subjects are situated, provided each tenant (whether joint or several) when the sheriff proceeds to consider his claim for registration, shall, for a period of not less than twelve months next previous to the last day of August in the present or the last day of July in any future year, have held such subjects or tenements, whether in his personal possession or not, under a lease or leases, minive of lease, or other written title, for a period of not less than fifty-seven years (exclusive of breaks), at the option of the landlord, or for the lifetime of the said tenant, where the clear yearly value of such tenant's interest, after paying the rent and any other consideration due by him for his said right, is not less than ten pounds, or for a period of not less than nineteen years, where the clear yearly value of such tenant's interest is not less than fifty pounds, or where such tenant shall, for the foresaid period of twelve months, have been in the actual personal occupancy of any such subject, where the yearly rent is not less than fifty pounds, or where the tenant, whatever the rent may be, has truly paid for his interest in such subject, a price, grassum, or consideration of not less than three hundred pounds:

provided always, that where, in any of these cases, the rent is payable in whole or in part in grain, the value shall be estimated according to the average fiars of the counties in which the heritable subjects are situated for the three preceding years, and where payable in any other species of produce, according to the average market prices of the neighbourhood for the same period; and the said values being once so fixed at the time of registering or refusing to register shall be held as settled for the whole period of the lease: provided also, that where the right to any such lease as would entitle the tenant to be registered and to vote, as hereinbefore provided, shall come to any person, within the preceding twelve calendar months above specified, by inheritance, marriage, marriage settlement, or *mortis causa* disposition, such person shall be entitled to be registered, on the first occasion of making up the lists of voters, as hereinafter provided, next following such succession or acquisition: provided also, that no sub-tenant or assignee to any sub-lease for fifty-seven or nineteen years, shall be entitled to be registered or to vote in respect of his interest under such lease, unless he shall be in the actual occupation of the premises thereby set.

X. From and after the end of this present parliament, the members who are to be returned to serve in any future parliament for any single city, town, or burgh on which the right of returning a member or members is by this act conferred, shall no longer be elected by the town councils of such cities, burghs, or towns, but directly by the several individuals on whom the right of electing such members to serve in parliament is by this act conferred; and where the election is by districts or sets of cities, burghs, or towns conjoined, the right of electing shall no longer be in the town councils or corporations of the said cities, burghs, or towns, or in delegates appointed by them, but in the individual voters on whom the right of election is by this act conferred; and the member to serve in parliament for any such district shall be returned according to the majority of individual votes given in the whole district.

XI. Every person, not subject to any legal incapacity, shall be entitled to be registered as hereinafter directed, and to vote at elections for any of the cities, burghs, or towns, or districts of cities, burghs, or towns, hereinbefore mentioned, who, when the sheriff proceeds to consider his claim for registration, shall have been, for a period of not less than twelve calendar months next previous to the last day of August in the present or the last day of July in any future year, in the occupancy, either as proprietor, tenant, or life-renter, of any house, warehouse, counting-house, shop, or other building within the limits of such city, burgh, or town, which, either separately or jointly with any other house, warehouse, counting-house, shop, or other building within the same limits, or with any land owned and occupied by him, or occupied under the same landlord, and also situate within the same limits, shall be of the yearly value of ten pounds: provided always, that the claimant shall have paid, on or before the twentieth day of August in the present, or the twentieth day of July in any future year, all assessed taxes which shall have become payable by him in respect of such premises previously to the sixth day of April then next preceding: provided also, that no such person shall be entitled to be registered or to vote in the present or any future year unless he shall have resided for six calendar months next previous to the last day of August in the present or the last day of July in any future year within such city, burgh, or town, or within seven statute miles of some part thereof: provided also, that persons so resident shall be entitled to be registered and to vote if they are the true owners of such premises as are hereinbefore mentioned, within such city, burgh, or town, of the yearly value of ten pounds or upwards, although they should not occupy any premises within its limits, or although the premises actually occupied by them should be of less yearly value than ten pounds; and that the husbands of such owners shall be entitled to vote, either in the lifetime of their wives, or after their death, if then holding such property by the courtesy of Scotland: provided also, that no person shall be entitled to be registered or to vote for any city, burgh, or town, who shall have been in the receipt of parochial relief within twelve calendar months next previous to the last day of August in the year 1832, or next previous to the last day of July in any succeeding year.

XII. The premises in respect of which any person shall be deemed entitled to be registered, and to vote in the election for any city, burgh, or town, or district, shall not be required to have been the same premises for the whole twelve months of his occupancy, but

may be different premises, but always of the requisite value, occupied in succession by such person; provided always, that such person shall have paid all the assessed taxes legally exigible from him in respect of all such premises; and that where such premises shall be of the yearly value of twenty pounds or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of ten pounds or upwards.

XIII. On or before the twentieth day of August, in the present year, every person claiming a right to vote, under any of the qualifications hereinbefore specified, at any election of a member to serve in parliament for any county in Scotland, shall give in a claim, subscribed by himself or his agent, to the schoolmaster of that parish of the county within which the property, or the greater part of it, on which he claims is situate, or in case of the incapacity of such schoolmaster, or of the office being vacant, to any person actually officiating as such schoolmaster, or to the schoolmaster of the next adjoining parish whose residence is nearest to the vacant school, which claim shall be in the form of the first part of the schedule F, printed copies of which forms or schedules, with the necessary blanks therein, to be filled up by the claimant, every sheriff clerk is hereby required to provide, and to furnish to the schoolmasters of the different parishes within his county as speedily as possible after the passing of this act, which several schoolmasters shall furnish copies of the same to all applicants, upon payment of the sum of sixpence only for each copy; upon which copies all the claims to be given in shall be engrossed by the said claimant; and each such schoolmaster, upon receiving back such claim, filled up and subscribed as above directed, shall immediately mark upon it the time of its being so lodged and presented, by filling up and subscribing the printed form at the bottom, and forming the second part of the said schedule F; and each such schoolmaster shall, immediately after the said twentieth day of August, make up an alphabetical list of the names, designations, and places of abode of all the persons within his parish for whom such claims shall have been presented, and shall cause a copy of such list to be affixed to the door of the church of such parish on or before the twenty-fourth day of August in the present year, and shall annex to each list so affixed a notice of the times when and the places where the sheriff shall begin to examine the claims to which no objections shall have been lodged, and also a distinct notice to all persons who may have claimed to be registered for the county, and intend to object to the registration of any of the persons named in the said list, to give in a note of their objections to the said schoolmaster on or before the fifth day of September next ensuing; which note of objections shall be signed by the person for whom it is presented, or by an agent on his behalf, and shall be in the form of the first part of the schedule H; and printed copies of such forms or schedules shall be provided by each sheriff clerk, and distributed to the several schoolmasters, by whom they shall be furnished to any person applying, upon payment of the sum of sixpence only for each copy; and upon these copies all the objections shall be engrossed by the objectors; and each such schoolmaster shall, on receiving back the same, filled up and subscribed as above, mark thereon the true date of its being so lodged and received, by filling up and subscribing the second part of the said schedule H; and every such objector shall, within two days after lodging such objection, give notice to the party to whose title he objects, by delivering to him, or forwarding to his dwelling-house, or transmitting to him or his known agent through the post-office, a copy of the said objection so given in; and proof of such notice having been given shall be made to the sheriff before he enters on the consideration of any such objection; and no claims or objections as above shall be received by any schoolmaster after the expiration of the time hereinbefore allowed and appointed for the giving in of such claims and objections respectively; and each such schoolmaster shall, on or before the eighth day of September in this present year, deliver or transmit to the sheriff clerk of the county the whole claims and objections so received by him, together with a copy or duplicate of the alphabetical list of claimants affixed by him to the church door of his parish; and it shall be competent to any such claimant who may conceive that his right to be registered is established by a written title, at any time after giving in his claim, and previous to the tenth day of September in this present year, to deliver or transmit to the sheriff clerk any such title, or extract thereof, as he may wish so to deliver, for which the said sheriff clerk shall be bound to grant his receipt: provided always, that the parishes of Tulliallan, Culross, and



Legie in the county of Perth, and the parish of Alva in the county of Stirling, shall, for the purposes of this act, be held to form parts of the county of Clackmannan; and the parishes of Muckhart and Fossoway in the county of Perth, shall, for the purposes of this act, be held to form parts of the county of Kinross; and all claims and objections and titles relating to properties situate in any of these parishes, shall be delivered or transmitted to the sheriff clerks of Clackmannan and Kinross respectively; and that all claims, objections, and titles relating to properties in the several districts of Orkney and Shetland shall be delivered or transmitted to the sheriff clerks of Orkney and of Shetland respectively.

XIV. Each sheriff shall, between the twelfth day of September and the fifteenth day of October in the present year, examine and decide upon the merits of all claims for registration within his county; and for this purpose the sheriffs of the counties of Aberdeen, Ayr, Argyle, Fife, Inverness, Lanark, Forfar, Perth, Renfrew, and Ross and Cromarty shall hold open courts during this period, at not less than three several towns or places in their said counties, including therein such towns or other places where the sheriffs or their substitutes have been in use to hold their ordinary courts, where there are such places; and the sheriffs in all the other counties shall hold open courts at not less than two several places, which places shall be so selected as to be most convenient for the claimants in the different districts of the said counties; and each sheriff shall, on or before the fifteenth day of August in the present year, deliver to the sheriff clerk a written notice of the days, within the period above mentioned, on which he is to hold his courts for the purpose of such registrations at each of the said places in the county, copies of which notice shall be transmitted by the sheriff clerks to each of the town clerks and parish schoolmasters in the county on or before the eighteenth day of the said month of August.

XV. On or before the said twentieth day of August in this present year every person claiming a right to vote for a member or members to serve in parliament for any city, burgh, or town, or district of cities, burghs, or towns, in Scotland, shall give in a claim subscribed by himself or his agent, and accompanied by such written title as he may choose to produce, to the town clerk of the city, burgh, or town within which the premises in respect of which he so claims are situate, provided there be at the time a town clerk appointed and officiating for such town, which claim shall be in all respects in the same form as is hereinbefore directed, as to claims to vote for a county, and shall be issued, received back, marked, and entered in a book or register by the town clerk on the same terms, and in the same manner in all respects as the claims for county votes are hereinbefore directed to be issued, received back, marked, and entered by the several parish schoolmasters and sheriff clerks of each county: provided always, that where the limits of any city, burgh, or town, as described in the schedule M, shall include the whole or part of any other burgh or town, the whole claims arising within such limits shall be given in to the clerk of the principal city, burgh, or town specified and described in such schedule, and not to the clerks of any of the subordinate burghs or towns partly or wholly included within the said limits: provided also, that where there is no town clerk in any such burgh or town, the claims made in respect of properties situate in such burgh or town shall be given in to a person resident within such burgh or town, to be nominated by the sheriff of the county within fifteen days after the passing of this act.

XVI. Each town clerk shall prepare an alphabetical list of the names, designations, and places of abode of all the persons within the city, burgh, or town of which he is clerk for whom such claim shall have been presented, and shall, on or before the twenty-sixth day of August in this present year, cause a copy of such list as includes the claimants within each parish to be affixed on or near the door of the church of every such parish within such burgh or town, annexing to each such list a notice to persons intending to object, to give in their objections to the said town clerk on or before the tenth day of September next ensuing, and also a notice of the time when and place where the sheriff of the county within which such city, burgh, or town may be situate, will begin to examine the claims to which no objections shall be lodged; and all such objections shall be framed in the same terms, and issued and received back by the said town clerk, in all respects, on the same considerations and in the same way and manner as is hereinbefore provided as to the objections against claims of registration for the county so to be issued and dealt with by the

schoolmasters in such county; and the same notices shall be given by the parties objecting to the party objected to as is provided in regard to such claims for the county; and no town clerk shall receive any claim or objection after the expiration of the time before allowed and appointed for giving in such claims and objections respectively.

XVII. Upon the twelfth day of September in this present year, each sheriff clerk and each town clerk of any city, burgh, or town within any one county, or any two counties or parts of counties united for the purposes of this act, shall lay before the sheriff the several claims and objections which have been received by any of the said clerks, together with the titles or documents which may have been lodged along with any of those claims; and the said sheriff shall forthwith proceed to examine the claims to which no objections have been lodged, and which have been supported by production of a written title, in the order, as nearly as possible, in which they were presented; and whenever he is satisfied that the title so produced does of itself afford *prima facie* evidence of the validity of the claim, he shall write upon the claim the word "admit," and mark the same with his initials, and forthwith return the said claim to the sheriff clerk, or the town clerk, by whom it was presented, which several clerks shall then enter the claimant in the books or registers of qualified voters to be kept by them for the county, and for the several burghs within the county respectively, in the alphabetical order of the voters' names, the names of the county voters in each parish being entered in a separate alphabetical series, and in the form of the schedule G; and the said sheriff clerk and town clerk shall there sign each entry with their initials, and each page of the register with their names, and shall furnish a signed copy of such entry to each voter, or to any person who may require it, upon payment of the sum of sixpence only for each such copy; and immediately after all the claims of this description which appear sufficiently established have been admitted, the sheriff shall proceed to the consideration of the other claims to which no objections have been given in, but which have either not been accompanied by any written title, or where the titles produced do not appear to him to afford *prima facie* evidence in their favour, and that in the order of the dates on which they were severally presented, and shall summarily inquire into and examine the evidence by which the parties, or their agents, may then be prepared to support them, by the examination of written documents, witnesses, or oath or declaration of parties, or otherwise, as the case may require or admit of; and when the said sheriff is satisfied that any claimant has made out a *prima facie* case in support of his claim, he shall write upon it the word "admit," and mark it with his initials, and return it to the sheriff clerk, or the several town clerks as hereinbefore provided, who shall thereupon enter the claimant in the register, in the same manner, and to the same effect, as is above provided as to admitted claims of the first description; but when the sheriff is not satisfied that there is *prima facie* evidence to support any such claim, he shall write upon it the word "reject," and mark it with his initials as above, and return the same to the said clerks, to be kept by them till applied for by the parties presenting the same or their agents, to whom, upon such application, they shall be forthwith delivered.

XVIII. When the sheriff has in manner aforesaid gone through and disposed of all the claims to which no objections are offered, he shall proceed to consider and hear the parties or their agents upon the several claims to which objections are lodged, and that in the order of the dates of presenting the said claims, and shall hear and receive all competent evidence which either party may produce in support of his claim or objection respectively; and where he is satisfied that the claim is well founded, he shall write on it the word "admit," authenticated as above, and return it to the clerk for registration, as in the other cases of admission already provided for; and where he is satisfied that it is not well founded, he shall mark it with the word "reject," and deal with it in other respects as with the rejected claims herein already provided for: provided always, that in all cases where no party shall appear to support a claim to which objections have been lodged, it shall be rejected upon the sheriff being satisfied that a *prima facie* case has been made out in support of the objection; and where no party shall appear to maintain his objection, the claim to which it applies shall be dealt with as if no objection had been lodged against it, and shall be admitted if the sheriff is satisfied that a *prima facie* case has been made out in support of it.

XIX. No written pleadings shall in any case be allowed in support of claims or objec-

tions; but when the sheriff shall reject any claim to which no objection has been offered, and when he shall hear parties upon any claim to which any objection has been offered, he shall make a note of the statement of fact, and of the pleas founded on it, and of the names of the witnesses, and shall affix his signature to the deeds, writings, and other documents produced by the parties in support of such claim or objection; and it shall not be competent to support any appeal upon any ground of fact or of law not set forth in such note of the sheriff, or to produce any witnesses not named in the said note, or any deeds, writings, or other documents to which the signature of the said sheriff is not affixed.

XX. On or before the fifteenth day of October in the present year, each sheriff clerk shall complete his alphabetical lists or registers of voters for the county: provided always, that on or before the said fifteenth day of October, each sheriff clerk, being the keeper of the roll of freeholders for the county of which he is clerk, shall transfer the names of all the freeholders standing on such roll after the passing of this act to the said lists or registers of voters, without requiring any claim to be presented on behalf of such freeholders; and if any election shall take place for such county before the said register shall be corrected at the next yearly revision, as hereinafter provided, the votes at this first election shall be taken according to this first alphabetical register, an authenticated copy or copies of which shall accordingly be sent for this purpose to each of the polling places appointed for the county: provided always, that at all future elections which shall take place after the yearly correction of such registers, the votes shall be taken according to the last completed register, as hereinafter mentioned.

XXI. On or before the twelfth day of October in the present year, each town clerk shall complete his alphabetical list or register of votes for the city, burgh, or town of which he is clerk; and that wherever such city, burgh, or town is one of a district contributing with other burghs for the return of a member to parliament, and is not the burgh at which the writ is to be proclaimed and the election held, the town clerk shall, within three days after the said twelfth day of October, make up and transmit an authenticated copy or duplicate of such list or register to the town clerk of the city, burgh, or town at which it is hereinafter provided that the election shall take place; and the town clerk of the said principal or returning burgh, after having received such duplicates from the other burghs of the district, shall forthwith combine and reduce the whole into one list or register of voters for the whole district, those for each burgh being always kept together, to be kept by him in the said principal burgh, for the purpose of reference and inspection; and if any election shall take place for such district before the said registers shall be corrected at the next yearly revision, as hereinafter provided, the votes at such election shall be taken in each burgh according to their first alphabetical registers for such burghs, the originals or authenticated copies of which shall accordingly be sent to each of the polling places that may be appointed in each such burgh; provided always, that in all future elections the votes shall be taken according to the last completed and corrected register, as hereinafter enacted.

XXII. Each sheriff shall once every year after the present year, examine and correct his said registers; and each sheriff clerk and town clerk within the county shall for this purpose, in the month of June, and between the tenth and twentieth days thereof in every such future year, give public notice, by advertisements affixed to the church doors of all the country, burgh, and town churches within the shire respectively, and also, if they shall see cause, by advertisement in the newspaper of greatest reputed circulation in the shire, to all persons intending to claim to be registered, or to object to the title of any voter already on the register, to give in their several claims, titles, and objections to the schoolmasters and town clerks, as such claims, titles, and objections respectively are by this act directed or authorized to be given in, and that in the forms already provided by schedules F and H, on or before the twentieth day of July then next ensuing, after which no such claims or objections shall be received; and when the new claims are so given in, the schoolmasters and the sheriff and the sheriff clerk, and several town clerks, within each county, shall deal with and dispose of them in the same order and manner, both as to publication of the claims and notices to objectors, and as to the periods or intervals at which they shall severally be received, notified, and disposed of, as is above provided with regard to the first or original claims for registration under this act; that is to say, that in so far as relates to claimants for

counties, the several schoolmasters shall affix the lists of such new claimants, with the notices hereinbefore directed, to the church doors, on or before the twenty-fourth day of July in each such year; that all objections to such claims shall be given in to such schoolmasters on or before the fifth day of August thereafter; that the claims and objections shall be delivered or transmitted to the sheriff clerks on or before the eighth day of the said month of August in each such year, the claimants being at liberty to lodge their written titles with the sheriff clerk at any time previous to the tenth day of the said month; and that the whole claims, objections, and titles shall be laid before the sheriff on or before the twelfth day of that month, who shall decide upon their merits between that day and the fifteenth day of September thereafter; and that, in so far as regards claimants in burghs, the several town clerks shall affix the lists of new claimants, with the notices hereinbefore directed, to the church doors of their burghs, on or before the twenty-sixth day of July in each such year; that the objections to such claims shall be given in on or before the tenth day of August thereafter; and that the whole claims, objections, and titles shall be laid before the sheriff on or before the twelfth day of the said month of August, who shall examine and decide upon the same on or before the fifteenth day of September in each such year; the said sheriffs always proceeding to three or to two several places, as above provided, in their several counties, and notifying to the sheriff clerk, on or before the fifteenth day of July in each such year, the days at which they are to hold their courts at each of the said places, of which days written notice shall be given by the sheriff clerks to each town clerk and parish schoolmaster in the county, on or before the eighteenth day of July in each such year: provided always, that the sheriffs shall upon this occasion correct any mistakes or omissions which may be pointed out or discovered in the registers in the name, residence, or condition, of any person already registered or otherwise; and each sheriff clerk shall for this purpose be obliged to keep a correct copy of the register for the county at some convenient place in the head burgh of the shire (the town of Lerwick in Shetland being held for this purpose the head burgh for that part of the county), and each town clerk shall keep a copy of the register for his burgh at some convenient place in the said burgh; which several registers shall, for a period of ten days next after the twentieth day of June in each year, be open to the inspection of all persons who may desire to see the same, without payment of any fee for such inspection; and each sheriff shall, on or before the fifteenth day of September yearly, have his said registers finally corrected and completed, and arranged as above directed, in the alphabetical order of the voters' names, with the several columns of particulars thereto annexed, as in schedule G; and after the said fifteenth day of September no change shall be made by any sheriff on his registers for that year, except only in consequence of the judgment of one or other of the courts of review hereinafter provided; provided always, that in case any of the days hereinbefore mentioned shall happen to be a Sunday or other holiday, on which no business is usually transacted, then and in that case the several acts and proceedings appointed to take place on such days shall take place on the day next ensuing.

XXIII. The sheriff's judgments, granting or refusing registration, shall, so long as they remain unaltered, be conclusive of the rights of parties claiming or objecting as above, but it shall be competent to any party, considering himself aggrieved by any such judgment, to appeal and apply for an alteration thereof, he always giving notice in writing to the sheriff clerk or town clerk, and to the opposite party, where the claim has been disputed, of such his intention to appeal, within five days after the judgment complained of, and producing evidence of such notice to the judge of appeal before entering on its merits.

XXIV. And in order that the greater number of appeals which may be expected to be given in after the first general registration under this act may be more easily and expeditiously disposed of, the sheriffs of Elgin and Nairn, Inverness, and Orkney and Shetland shall form a court of review for deciding upon all such appeals as may be taken from the judgments pronounced in this present year on any such claim for registration, under this act, by the sheriffs of any of these three counties, or by the sheriffs of the counties of Caithness, Sutherland, Ross and Cromarty, and Banff; and the sheriffs of Aberdeen, Argyle and Perth shall form a court of review for deciding upon all such appeals as may be taken from the judgments pronounced in this present year on any such claim for registration, under this act, by the sheriffs of any of these three counties, or by the sheriffs of the counties of Forfar,

Kincardine, or Fife; and the sheriffs of Lanark, Ayr, and Stirling shall form a court of review for deciding upon all such appeals as may be taken from the judgments pronounced in this present year on any such claim for registration, under this act, by the sheriffs of any of these three counties, or by the sheriffs of the counties of Dumbarton, Kinross, and Clackmannan and Bute; and the sheriffs of Renfrew, Kirkcudbright, and Dumfries shall form a court of review for deciding on all such appeals as may be taken from the judgments pronounced in this present year on any such claim for registration, under this act, by the sheriffs of any of these three counties, or by the sheriffs of the counties of Peebles, Selkirk, and Wigton; and the sheriffs of Edinburgh, Linlithgow, and Berwick shall form a court of review for deciding upon such appeals as may be taken from the judgments pronounced in this present year on any such claim for registration, under this act, by the sheriffs of any of these three counties, or by sheriffs of the counties of Roxburgh and Haddington; and each three of the sheriffs above named, as joint judges of appeal for the counties hereinabove specified, shall, within eight days after the said first registers shall be completed as hereinbefore provided, proceed upon a circuit into the district as to which they are hereby constituted judges of appeal, and shall repair successively to the county town, and to at least one other town in each of the counties, in each such district, (excepting always combined counties, which shall for this purpose be held but as one county, and excepting also the county of Orkney and Shetland, for which the court of review shall be held only at Kirkwall in Orkney,) and shall there hear and determine on all such appeals, notice having been given by advertisements in the newspapers of the different places at which they are successively to hold their courts, and of the days respectively on which their said courts are to be opened in each place; and in case of the necessary absence of any of the three sheriffs hereinbefore mentioned, the remaining two shall be a quorum for judging in such appeals; but in case of their differing in opinion, they shall be obliged to refer the case for the judgment of the sheriff who shall be absent; and in the event of any of the sheriffs herein named as judges of appeal being incapacitated or dying, and no successor being appointed, after the passing of this act, and before the time arrives for holding the courts of appeal hereinbefore directed, the lord president of the court of session shall appoint some other sheriff to act in his place, who shall act and proceed accordingly; and no written pleadings shall be allowed before such courts of review, nor any record be made up of their proceedings, and no written sentence shall be pronounced, except by one of the said sheriffs writing the word "admit" or "reject," (as the case may be,) on the claim in dispute, and by him and the other sheriffs subscribing their names to the word so written: provided always, that it shall be competent for such sheriffs, acting as judges of appeal, to find the appellant liable in costs when they affirm the judgment appealed from, and to modify and decern for the same; on which decerniture the respondent shall be entitled to enforce payment as of an ordinary debt, within the county where the disputed claim was presented; and the judgments of such sheriffs on all such appeals shall be pronounced on or before the twenty-fifth day of November in this present year, and shall be final and conclusive to all intents and purposes, and not liable to any process of review; and shall, whenever they vary or reverse the judgment complained of, be, upon their production subscribed as above, a warrant for the sheriff who made up the register to alter and correct his registers in conformity thereto, and he shall so alter and correct them accordingly, and shall have the said registers completed with such corrections on or before the thirtieth day of November in this present year.

XXV. Whenever any party shall be dissatisfied with any judgment of a sheriff, admitting or refusing registration, or expunging or refusing to expunge any names already on his register, at any of the annual registrations and corrections hereinbefore directed to be held in any future year, it shall be competent for any such party, wherever the county of such sheriff is within any circuit of the court of judicary, to appeal from such judgment to the sheriffs liable in attendance at such circuit for the district within which such county is situate, which sheriffs, or some three of their number, shall remain at, or return to the circuit town of such district after the autumnal circuit in each such year, and there begin to hold their court for disposing of such appeals on some day between the fifteenth and twenty-fifth days of September in each such year, of which day notice shall, one week before, be given by advertisement in the newspaper of greatest circulation within such county, and the said

sheriffs shall there finally determine all such appeals on or before the twentieth day of October thereafter; the sheriffdom of Orkney and Shetland being always held for this purpose to be within the district of Inverness, and the sheriff, when present, being entitled to act as a judge of appeal: provided always, that where the sheriffs liable in attendance at any such circuit are fewer than three, or where any of them is unavoidably prevented from attending by sickness or other accidental cause, the judge or judges at the said autumnal circuit shall nominate and appoint one or more other sheriffs, or advocates of not less than four years' standing, to act along with the attending sheriffs, so as that there shall always be three judges in such court of review; and with regard to the judgments pronounced in such annual registrations by the sheriffs of the counties of Edinburgh, Haddington, or Linlithgow, respectively, the appeal shall be to the sheriffs of the three said counties jointly, and they are hereby required to hold a court for this purpose at Edinburgh, at some time previously announced, between the fifteenth and twenty-fifth days of September in each year, and finally to determine on all appeals on or before the twentieth day of October thereafter: provided always, that, in the event of the sickness or unavoidable absence of any of the said three sheriffs, it shall be competent to the lord president of the court of session, on the application of any of the said sheriffs, to appoint some other sheriff, or advocate of four years' standing, to act and officiate in place of the sheriff so incapacitated; and the judgments of the said courts of review shall in all cases be final and conclusive, and liable to no process of review, and shall, whenever they reverse or vary the judgments of the sheriff appealed from, be warrants to him to alter and correct his registers in conformity thereto, and he shall, on such judgments being made known to him by the parties, alter and correct such registers accordingly: provided always, that no alteration of the sheriff's judgments, either by the courts of review above named, or by any other judges of appeal, shall affect the merits of any election actually completed and carried through before the date of such alteration, except in so far as effect may be given to such alteration by any committee of the commons house of parliament to which a petition against such election may be referred: provided also, that nothing herein contained shall be held to limit or restrain the powers of such committee to take into consideration the validity of any vote or claim for registration admitted or rejected by the sheriff of the judges of appeal, and to alter the register, poll, or return accordingly, in so far as concerns the election petitioned against: provided also, that in all proceedings before such committee for determining the validity of any election for Scotland, all deeds, instruments, extracts, or other writings, which are probative by the law of Scotland, shall be deemed and taken to be probative, and shall be received in evidence by such committee, without proof of the execution, signing, or examination thereof, in the same manner as such deeds, instruments, extracts, or other writings are now admitted in courts of law and equity in Scotland.

XXVI. In all elections, after the end of this present parliament, every qualified person whose name shall appear in the last corrected register, and none other, shall be entitled to vote; and it shall not be competent to inquire on that occasion into any other facts except those of the party tendering the vote being truly the individual mentioned in the said register, of his being still possessed of the qualification there recorded, on his own account, and not in trust for or at the pleasure of any other person, and of his not having previously voted at that election: provided always, that the inquiry into these facts shall, on this occasion, be confined to the putting to the person so tendering his vote, if the sheriff shall be required so to do on behalf of any candidate, an oath, or if he be a Quaker or Moravian, a solemn affirmation, in the form of the schedule I; and it shall not be competent at any such poll or election to put to any registered voter any other oath or affirmation whatsoever, except only an oath or affirmation against bribery, which, if required on the part of any candidate, shall then be put by the sheriff in the form of schedule K: provided always, that any person who has claimed to be registered, but whose claim has been rejected by the sheriff or court of review, may, notwithstanding, tender his vote at any election where such register is in force, and the sheriff or his substitute shall enter any vote so tendered, with the name of the person for whom it is given, distinguishing the same from the votes given by persons on the register, so that it may be in the power of any election committee to give effect to such vote in deciding upon the validity of any disputed election; but no scrutiny shall be allowed by or before any returning officer with regard to any votes given or tendered at any such election.

XXVII. Within three months after the passing of this act, each sheriff shall divide his county into convenient districts for polling, following, as nearly as possible, the boundaries of parishes, baronies, or other known subdivisions, and shall appoint a particular polling place for each such district, which place shall be selected so as to be most accessible to the voters in the district; and such polling places shall in no case be more in number than fifteen for any one county, and shall be so arranged as that no more than six hundred persons or thereabouts shall poll at any election at any one place; and each town clerk shall, in like manner, appoint one polling place in every city, burgh, or town of which he is clerk, in which the number of voters does not exceed six hundred or thereabouts, and shall, wherever the number of registered voters in any such city, burgh, or town shall exceed six hundred or thereby, divide the said city, burgh, or town into convenient districts, and appoint a convenient polling place in each such district, so as that no more than about six hundred persons shall poll at any election at any such place; and each sheriff clerk shall, within fourteen days after the sheriff has so divided his county into districts for polling, make up a distinct list of the said districts and the polling place appointed in each, and shall cause copies of the said lists to be affixed to the doors of all the country parish churches in his county; and each town clerk shall, within the same period, affix lists of the polling place or polling places within his burgh to all the church doors within the same; and every voter shall poll at the polling place of the district within which the premises, or any part of them, in respect of which he claims to vote, may be situate, except only where such polling place shall be in an island distant more than ten miles from the mainland of any county, in which case the voters not resident in such island may poll at the polling place for the district in which the county town is included: provided always, that with respect to the contiguous burghs of Anstruther East, Anstruther West, and Kilrenny, the town clerk of Anstruther East shall appoint one polling place within the said burgh of Anstruther East for the whole of the said three burghs, which place shall be notified in manner herein provided, and all the voters in the said three burghs shall poll at the polling place so appointed; and at any contested election, the sheriff shall, if required by any of the candidates, direct two or more booths, or halls, rooms, or other places for polling, to be provided at each polling place; and all polls shall be taken, both at elections for shires, and for cities, burghs, and towns, under the superintendence of the sheriff, or of a substitute or substitutes named by him, which substitutes the sheriff is hereby empowered to name at his own discretion, without observing the forms necessary in the appointment of ordinary substitutes receiving salaries; and each substitute so superintending a polling place shall have the assistance of a clerk or of clerks, to be appointed by the sheriff, with the concurrence of the candidates, if they can agree, and by the sheriff clerk of the county in case of their not agreeing; and each poll clerk shall have with him at the polling place an authenticated copy of the register of that district of the shire, or of the city, burgh, or town, or cities, burghs, or towns, attached to each such polling place entitled to share in the election within the said shire, as the case may be, alphabetically arranged as herein directed, according to which copy the votes shall be taken.

XXVIII. Writs for the election of members to serve for shires, or for any city, burgh, or town entitled to send a member or members for itself, shall be directed as heretofore to the sheriff of the shire; and where the election is for a district of cities, burghs, or towns, a writ shall be directed to the sheriff specified in schedule L, and shall be proclaimed as hereinafter directed, at the town specified in the said schedule L for each of the said districts respectively; and each sheriff shall endorse on the back of the writ the day on which he received it, and shall within three days thereafter announce a day or days, which day or days shall (except only in the case of Orkney, as hereinafter provided) not be less than ten nor more than sixteen days after that on which the writ was received, for the election or elections within his shire, and shall give due intimation thereof by printed or written notices affixed on the doors of all the parish churches (except as hereinafter excepted) within the county, when the election is for a county, and of all the parish churches in the city, burgh, or town, or cities, burghs, or towns, when the election is for a town or district of towns, and also, where he thinks this expedient, by advertisement in the newspaper or newspapers of great est circulation in the county or district.

XXIX. On the day named by the sheriff for the election for the shire, the sheriff shall

repair to the market cross, or some other convenient and open place in or immediately adjoining the county town, and shall there publicly proclaim the writ by reading it; provided always, that the writ for the united counties of Clevelandman and Kinross shall be proclaimed at the town of Dollar; and that the writ for the united counties of Elgin and Nairn shall be proclaimed at the town of Forres; and that the writ for the united counties of Ross and Cromarty shall be proclaimed at the town of Dingwall; and if no more than one candidate shall at the time of such proclamation be proposed for the choice of the electors, he shall, upon a show of hands, forthwith declare the person so put in nomination to be duly elected: but if more candidates shall be proposed, and a poll is demanded, the proceedings shall be adjourned for a period to be named by the sheriff, but not exceeding two free days, exclusive of Saturdays and Sundays, and the polling shall commence at the places previously intimated, at nine of the clock of the day that shall be named.

XXX. Where the election shall be for any city, burgh, or town, or district of cities, burghs, or towns, the sheriff to whom, as heretofore directed, the writ shall have been addressed, shall, on the day and hour previously named by him for such election, repair to the market cross, or some other convenient and open place in or immediately adjoining any town or burgh sending a member by itself, or that town of any district at which, as heretofore directed, the writ for the whole district is to be proclaimed, and shall there publicly proclaim the writ by reading it; and if no more candidates shall be proposed for the choice of the electors than there are vacancies to be filled up, he shall declare the person or persons put in nomination to be duly elected, on a show of hands; it being always competent for any registered voter residing, or having his qualification in any other city, burgh, or town of the district, to repair to the place where the writ is thus proclaimed, and to put any person in nomination, provided that voter shall first satisfy the sheriff that he is truly registered, by producing an extract of his registration, and by taking, if required, the oath in schedule I; but if more candidates shall be proposed than there are vacancies to be filled up, and a poll shall be demanded, the proceedings shall be adjourned for not more than three free days, exclusive of Saturdays and Sundays: provided always, that in the district including the town of Kirkwall in Orkney the adjournment may be made for any period not exceeding seven free days; and the sheriff who proclaimed the writ, having thus fixed one particular day on which the polls are to take place in all the burghs of the district, shall forthwith send a written notice to each sheriff within whose shire any city, burgh, or town of the district is situate, that a poll has been demanded, and also of the day on which it is to begin; and each such sheriff shall accordingly appoint such a number of substitutes and clerks as may be necessary to assist or officiate as before provided at each of the polling places provided in any of the cities, burghs, or towns of such districts within his county; and the polling shall begin at each such polling place at nine of the clock of the day so appointed, and shall proceed thereafter as hereinafter provided.

XXXI. And in respect of the remote situation of certain parts of the county of Orkney and Shetland, and the occasional difficulty of communication therewith, the sheriff of Orkney to whom the writ for the election of a member for the said county shall be addressed at Kirkwall, shall, within twenty-four hours after receiving the same, issue a precept to the sheriff substitute in Shetland, fixing a day for the election for the said county, which day shall not be less than twelve nor more than sixteen days after that on which the writ was received, and shall forward or transmit the said precept, with the least possible delay, directly to the said sheriff substitute in Shetland, who, immediately on receipt thereof, shall announce the day of election by notices on the church doors; and if on the day of election more candidates than one shall be put in nomination, and a poll shall be demanded, the sheriff shall then adjourn the proceedings for a period of not less than ten, or more than fourteen days, and shall within twenty-four hours despatch notice of this adjournment to the sheriff substitute of Shetland, as in the case above provided for; and the polling shall commence accordingly at the different polling places in both parts of the county on the day to which the proceedings are adjourned, and shall proceed as hereinafter directed, as in other cases of polling.

XXXII. No poll at any election, either for a county or a city, burgh, or town, or district of cities, burghs, or towns, shall be directed to begin on a Saturday, or shall be kept open for



more than two consecutive days, and that only between the hours of nine in the morning and four in the afternoon for the first day, and between the hours of eight in the morning and four of the afternoon for the second day : provided always, that the poll at any one place may be closed before the termination of the said two days, if all the candidates or their agents and the sheriff shall agree in so closing it : provided also, that where the proceedings at any election shall be obstructed by any riot or open violence, the sheriff or his substitute at the place where the riot has occurred, may adjourn the poll at that place to the following day or some other convenient time, and if necessary may repeat such adjournment till such obstruction may have ceased, he always giving notice to the sheriff who is to make the return of such adjournment having been made ; and any day where the poll shall have been so adjourned at any polling places shall not be reckoned one of the two days of polling within the meaning of this act, nor shall the state of the poll be finally declared, nor the result of the election proclaimed, until the poll so interrupted shall be closed and transmitted, as hereinbefore provided, to the sheriff who is to make the return ; and each sheriff in charge of each polling place shall take care that the attending clerk at the place has with him a certified copy of the aforesaid alphabetical register, and shall receive the votes of all persons then qualified to vote according to the provisions of this act, and shall record and progressively number each vote for each candidate in a poll book, and he and the clerk shall subscribe their names to each page of the said book before making or allowing to be made any entry in the succeeding page ; and the poll book or books shall at the close of the first day's polling be publicly sealed up by the said acting sheriff and poll clerk, and be taken charge of by the said sheriff, and on the commencement of the poll of the second day he shall publicly break the seals, and then proceed as formerly ; and immediately after the poll at his polling place is finally closed, the officiating sheriff shall forthwith seal up and transmit or deliver the said poll books to the sheriff acting as the returning officer for the shire.

XXXIII. The sheriff to whom the said poll books have been transmitted or delivered, shall on the day next but one after the close of the poll (unless such day shall be Sunday, and then on the Monday following), openly break the seals of the said poll books, and cast up the number of votes as they appear on the said several books, and shall openly declare the state and result of the poll, and make proclamation of the member or members chosen, not later than two of the clock of the afternoon of the said day, and shall forthwith make a return in the form presently used (as nearly as may be), in terms of the writ, under his hand and seal, to the clerk of the crown in England ; and if the votes shall be equal, he shall make a double return.

XXXIV. Where the election is for one city, burgh, or town sending a member or two members by itself, or for a district of towns lying wholly within one shire, the said poll books shall be transmitted to and the return made by the sheriff of the shire within which such city, burgh, or town, or district shall be situate ; and where the election shall be for a district or set of burghs or towns lying in different shires, the said poll books shall be severally transmitted in the first instance to the sheriffs of the several shires within which any of the said burghs or towns shall be situate, and thereafter the other sheriffs shall transmit the said poll books to the sheriff, to whom, as herein provided, the writ shall have been directed, by whom the votes shall be summed up, and the result declared, and the return of the person or persons duly elected shall be made, as above, to the clerk of the crown in England.

XXXV. No person not now on the roll of freeholders shall be admitted to claim or to vote at the election for any shire in respect of any subject situate within the limits of any city, burgh, or town entitled to send or to contribute towards sending a member to parliament ; nor shall any person be admitted to claim or to vote in the election for any city, town, or burgh in respect of any subject not situate within the limits of the said city, town, or burgh.

XXXVI. No sheriff shall be entitled, from and after the passing of this act, to vote at any election for any member of parliament to be holden within the county or combined counties of which he shall be sheriff ; and no sheriff substitute, and no sheriff clerk or deputy sheriff clerk, shall be entitled, from and after the passing of this act, to vote or to be elected at any election for a member to serve in parliament for the shire of which he is the sheriff substitute or sheriff clerk ; and no town clerk or depute town clerk shall be entitled

to vote or to be elected for the city, burgh, town, or district in which he is such clerk; and no sheriff substitute, sheriff clerk, or town clerk shall, after the passing of this act, directly or indirectly, act as an agent for any candidate in any matter connected with or preparatory to any election for the county or burgh respectively in which such persons shall be respectively sheriff substitute, sheriff clerk, or town clerk.

XXXVII. From and after the end of this present parliament, the eldest sons of Scotch peers shall be entitled to be registered and to vote at all elections for members of parliament for Scotland, and shall also be entitled, though not so registered, to be elected to serve as such members for any county, city, burgh, or town, or district of burghs, in Scotland; and after the end of this present parliament, no member for any county in Scotland shall be required to be qualified as an elector, or to hold any superiority within such county.

XXXVIII. If any sheriff, sheriff substitute, sheriff clerk, town clerk, or any person whatsoever, shall wilfully contravene or disobey the provisions of this act, or any of them, with respect to any matter or thing which such sheriff, sheriff substitute, sheriff clerk, town clerk, or other person is hereby required to do, he shall for such his offence be liable to be sued in the court of session by any registered voter, candidate, member actually returned, or other party aggrieved, for the penal sum of five hundred pounds; and the jury before whom such action shall be tried may find their verdict for the full sum of five hundred pounds, or for any less sum which the said jury shall think it just that such party defender should pay to such party pursuer; and the defender in such action being convicted shall pay such penal sum so awarded, with full costs of suit, to the party who may sue for the same, without prejudice, however, to the right of any party aggrieved by the misconduct of any sheriff as returning officer to recover such damages for a false return as he may be entitled to at common law, or by virtue of any statute now in force: provided always, that every such action shall be raised within four calendar months next after the cause of action has arisen, and that notice in writing shall be given to the defender at least one month before the raising of any such action, signed by the party raising such action, or his agent, and setting forth the place of abode of the party signing the same: provided also, that any such defender against whom any judgment shall have been recovered, in any such action, shall be allowed to plead such judgment as a bar to any other action which may be brought against him for the same matter or thing, and such other action being thereupon dismissed, such defender shall recover his full costs thereof.

XXXIX. Every person claiming to be registered, shall, at the time of making such claim, pay a fee of two shillings for the use of the sheriff clerk, or to the town clerk receiving such claim; out of which monies the said clerks respectively shall be obliged to provide all the books, and to perform all the clerk's business necessary for making up the registers, and making copies thereof for the different polling places in the shire or burgh.

XL. The monies which are now in use to be allowed to the sheriffs in their accounts with the exchequer for executing writs for elections, shall continue to be allowed to them on such accounts; and all halls, rooms, booths, or other places hired, constructed, or prepared for taking the polls, shall be so hired, constructed, or prepared by contract with the candidates, or, if they cannot agree, by the sheriff clerk, at their joint and equal expense: provided always, that the expense of such hiring or construction at any one polling place for a county shall not exceed the sum of thirty pounds, nor the sum of twenty pounds at any one polling place in any city, burgh, or town; and the candidates shall further be bound to pay and contribute among them to each poll clerk one guinea per day; and, in like manner, to contribute and pay a certain fee to each sheriff or sheriff substitute for superintending the polls, the amount of which fee shall in no case exceed the sum of three guineas per day for each such sheriff or substitute; and the candidates, in all cases where a poll has been demanded, shall, in like manner, be bound to defray the necessary expenses incurred by the sheriff or sheriff clerks, or town clerks, in the transmission of precepts, intimations, poll books, or other communications required or enjoined by this act; and if any person shall be proposed as a candidate without his consent, the person so proposing him shall be liable to defray his share of all these expenses, in like manner as if he had been a candidate himself.

XLI. Each sheriff shall be entitled to make a charge for the time and labour employed

in investigating and disposing of the claims and objections above specified, either originally in his own county, or there or elsewhere, as a judge of appeal, which charge shall not be more than five guineas for every period of eight hours employed by him or by any assistant sheriff or advocate to be appointed in the manner by this act authorized and directed, exclusively, in any such investigations, over and above his or their reasonable travelling expenses; and which charge shall be audited and examined in the exchequer, and allowed in whole or in part, as may seem just, in the same manner as other charges hitherto included in the annual accounts of such sheriffs, the said charge to be always stated in exchequer as soon as conveniently may be after the duty is performed, and to be there audited and allowed at the first settlement of each sheriff's accounts which shall thereafter take place: provided always, that no charge shall, in any case, be allowed for a greater number of hours so employed by such sheriff and by such assistants in originally deciding on the claims in any one county, than thirty periods of eight hours for each such sheriff and assistant respectively.

XLII. When any sheriff who is hereinbefore required to examine and decide on the claims for registration within his county, or to whom any writ for election is directed, shall be incapacitated from acting by sickness or unavoidable absence, one of his ordinary substitutes may act in his stead, provided he hold a substitution specially authorizing him to do so: provided also, that if the sheriffs of the counties of Edinburgh, Lanark, Fife, Forfar, Aberdeen, Perth, Ayr, Inverness, or Renfrew, or Orkney in Shetland, or any of them, shall, after the passing of this act, represent to the lord president of the court of session, that, by reason of the great number of claims of registration presented or likely to be presented in such counties, it will be impracticable for them, without assistance, to dispose of such claims within the period limited by this act; then, and in that case, it shall be competent to the said lord president, being satisfied of the correctness of such representation, and he is hereby required to nominate and appoint one or more other sheriffs or advocates of at least four years' standing, to assist in disposing of the said claims within the said counties, or any of them; and all judgments pronounced by the said assistant sheriffs or advocates shall be liable to be appealed from, as if they had been pronounced by the sheriff of the county.

XLIII. The notices required by this act to be given at church doors shall not be necessary at any of the churches in the islands of North Uist, South Uist, Barra, Harris, or Eig, in the county of Inverness, nor at any of the churches in the island of Lewis in the county of Ross, nor at any of the churches in the islands of Tiree, Coll, or Gigha, in the county of Argyll, nor at any of the churches in the county of Orkney and Shetland, except such as are in what is called the mainland of Orkney and Shetland respectively.

XLIV. The assessment, collection, and management of the money termed the "rogue money," which is now vested in certain meetings of the freeholders, shall be transferred to the commissioners of supply at their ordinary stated meetings, and they shall be bound to collect and apply it for the same purposes as heretofore.

XLV. All powers, duties, and functions now vested in or exigible from any meeting of freeholders, by any law or statute in force at the dissolution of this present parliament, shall thereafter be transferred to and vested in the said commissioners of supply, who shall exercise and discharge the same at their regular meetings as fully and effectually as the said meetings of freeholders might previously have exercised or discharged them.

XLVI. The word "sheriff" shall be held to include the word "steward;" and the words "sheriff substitute" shall be held to include the words "steward substitute;" and the words "shire" or "county" shall be held to include the word "stewartry;" and the words "sheriff clerk" shall be held to include the words "steward clerk," and "sheriff clerk depute, and "steward clerk depute;" and the words "town clerk" shall be held to include the words "town clerk depute:" provided also, that no misnomer or inaccurate description of any person or place in any writing made in the form of any schedule to this act annexed, or in any list or register or notice made under authority of this act, shall in any way prevent or abridge the operation of this act, provided that such person or place shall be so designated in such writing, list, register, or notice, as to be commonly understood: provided also, that no appeal shall be competent to any sheriff or steward from any thing which may be done by their substitutes in the execution of this act.

XLVII. All laws, statutes, and usages now in force respecting the right of electing the

qualifications of electors, and the actual election of members to serve in parliament for that part of Great Britain called Scotland, shall be and the same are hereby repealed in so far as they are inconsistent or at variance with the provisions of this act: provided always, that the same shall be in force in all other respects whatsoever.

XLVIII. If a dissolution of the present parliament shall take place after the passing of this act, but before the first day of December in the present year, in such case such persons only shall be entitled to vote in the election of members to serve in a new parliament for any county, city, burgh, or town, or district of cities, burghs, and towns, as would have been entitled to be inserted in the respective lists of voters for the same directed to be made under this act if the day of election had been the day for making out such respective lists, and all persons shall be entitled to vote in such election although they may not be registered according to the provisions of this act, any thing herein contained notwithstanding; and the polling at such election for any county may be continued for fifteen days, and the polling at such election for any city, burgh, or town, or district of cities, burghs, or towns, may be continued for eight days, any thing herein contained notwithstanding.

#### SCHEDULES TO WHICH THE PRECEDING ACT REFERS.

##### SCHEDULE A.

###### COUNTIES TO RETURN ONE MEMBER EACH.

Aberdeen  
Argyle  
Ayr  
Banff  
Bute  
Berwick  
Caithness  
Dumbarton  
Dumfries  
Edinburgh  
Fife  
Forfar  
Haddington  
Inverness  
Kincardine  
Kircudbright

Lanark  
Linlithgow  
Orkney and Shetland  
Peebles  
Perth, exclusive of the parishes of Tulliallan, Culross, Muckhart, Logie, and Fossaway, annexed to Kinross and Clackmannan by schedule B.  
Renfrew  
Roxburgh  
Selkirk  
Stirling, exclusive of the parish of Alva, annexed to Kinross, &c. by schedule B.  
Sutherland  
Wigton

##### SCHEDULE B.

###### COMBINED COUNTIES, EACH TWO TO RETURN ONE MEMBER.

Elgin and Nairn.

Ross and Cromarty.

Clackmannan and Kinross, together with that part of Perthshire which constitutes the parishes of Tulliallan, Culross, and Muckhart, and the Perthshire portions of the parishes of Logie and Fossaway, and that part of the shire of Stirling which constitutes the parish of Alva.

##### SCHEDULE C.

###### TOWNS TO RETURN TWO MEMBERS EACH.

Edinburgh

Glasgow

##### SCHEDULE D.

###### TOWNS TO RETURN ONE MEMBER EACH.

Aberdeen  
Paisley  
Dundee

Greenock  
Perth

## SCHEDULE E.

COMBINED BURGHES AND TOWNS, EACH SET OR DISTRICT JOINTLY TO RETURN ONE MEMBER.

Kirkwall . . . . .	1.	}	Jointly.	Renfrew . . . . .	8.	}	Jointly.		
Wick . . . . .				Rutherglen . . . . .					
Dornock . . . . .				Dumbarton . . . . .					
Dingwall . . . . .				Kilmarnock . . . . .					
Tain . . . . .				Port Glasgow . . . . .					
Cromarty . . . . .									
Fortrose . . . . .	2.	}	Jointly.	Haddington . . . . .	9.	}	Jointly.		
Inverness . . . . .				Dunbar . . . . .					
Nairn . . . . .				North Berwick . . . . .					
Forres . . . . .				Lauder . . . . .					
				Jedburgh . . . . .					
Elgin . . . . .	3.	}	Jointly.	Leith . . . . .	10.	}	Jointly.		
Cullen . . . . .				Portobello . . . . .					
Banff . . . . .				Musselburgh . . . . .					
Inverury . . . . .									
Kintore . . . . .									
Peterhead . . . . .									
Inverbervie . . . . .	4.	}	Jointly.	Linlithgow . . . . .	11.	}	Jointly.		
Montrose . . . . .				Lanark . . . . .					
Aberbrothwick . . . . .				Falkirk . . . . .					
Brechin . . . . .				Airdrie . . . . .					
Forfar . . . . .				Hamilton . . . . .					
Cupar . . . . .	5.	}	Jointly.	Ayr . . . . .	12.	}	Jointly.		
St Andrews . . . . .				Irvine . . . . .					
Anstruther Easter . . . . .				Campbelltown . . . . .					
Anstruther Wester . . . . .				Inverary . . . . .					
Craig . . . . .				Oban . . . . .					
Kilrenny . . . . .									
Pittenweem . . . . .									
Dumfries . . . . .	6.	}	Jointly.	Dumfries . . . . .	13.	}	Jointly.		
Kirkcaldy . . . . .				Sanquhar . . . . .					
Kinghorn . . . . .				Annan . . . . .					
Burntisland . . . . .				Lochmaben . . . . .					
				Kirkcudbright . . . . .					
Inverkeithing . . . . .	7.	}	Jointly.	Wigton . . . . .	14.	}	Jointly.		
Dunfermline . . . . .				New Galloway . . . . .					
Queensferry . . . . .				Stranraer . . . . .					
Culross . . . . .				Whithorn . . . . .					
Stirling . . . . .									

## SCHEDULE F. (Part First.)

shire or town of I, A. B. [designation] hereby claim to be enrolled as a voter in the county [or town] of as proprietor [tenant or occupant] of the lands [or houses, feu duties, *et cetera*,] of in the parish [or town] of and county of ; and in cases within burgh in support of my claim I produce herewith a [disposition, seisin, lease, *et cetera*, of date, *et cetera*, as the case may be.]  
(date.) (Signed) A. B.

## SCHEDULE F. (Part Second.)

No. lodged with me C. D. schoolmaster of or town clerk of in shire, this day of (together with the disposition, seisin, lease, *et cetera*, above written in cases of claims within burghs.)  
(Signed) C. D.

## SCHEDULE G. (No. 1.) for COUNTIES.

FORM OF REGISTER BOOK TO BE KEPT BY SHERIFF CLERK.

No.	Date of Registering.	Name.	Calling.	Proprietor or Tenant.	Description of Property, Land, House, Fen Duty, &c.	Name of Place, Village, Farm, &c.	County.

## SCHEDULE G. (No. 2.) for TOWNS.

FORM OF REGISTER TO BE KEPT BY TOWN CLERK.

No.	Date.	Name.	Calling.	Proprietor or Tenant.	House, Warehouse, Shop, &c.	Street, Lane, or other Place of Residence.	Parish.

## SCHEDULE H. Part First.

Shire or town of \_\_\_\_\_ I, E. F., object to the claim of A. B. to be admitted [or to continue on the roll] as a voter for the shire or town of \_\_\_\_\_ on the following ground; [here may be stated shortly the ground, as that property or occupancy not of sufficient value; that the party is not or has ceased to be proprietor, tenant, or occupant; that he has not paid taxes; that he is personally disqualified, as being a minor, a fatuous person, an officer of the revenue, et cetera;] and I crave to be heard on the said objection before the sheriff.

(Date.)

(Signed)

E. F.

## SCHEDULE H. Part Second.

Objections to No. \_\_\_\_\_ lodged with me,  
G. H., schoolmaster or town clerk, this \_\_\_\_\_ day of \_\_\_\_\_  
(Signed) G. H.

## SCHEDULE I.

I, A. B., do solemnly swear [or affirm] that I am the individual described in the register for \_\_\_\_\_ as A. B. of \_\_\_\_\_ [here insert description in the same words as contained in the register]; that I am still the proprietor [or occupant] of the property for which I am so registered, and hold the same for my own benefit, and not in trust for or at the pleasure of any other person; and that I have not already voted at this election.

## SCHEDULE K.

I, A. B., do solemnly swear (or affirm) that I have not received, or had, by myself or any person for my use or benefit, any sum or sums of money, office, place, or employment, gift or reward, or any promise or security for any money, office, or gift, in order to give my vote at this election.

## SCHEDULE L.

Towns where the Writ for Districts is to be proclaimed.	Sheriffs to whom the Writ is to be addressed.
Leith, for the district to which it belongs . . . .	Sheriff of Edinburgh.
Wick, for the district to which it belongs . . . .	Sheriff of Caithness.
Inverness, for the district to which it belongs . . . .	Sheriff of Inverness.
Elgin, for the district to which it belongs . . . .	Sheriff of Elgin and Moray.
Montrose, for the district to which it belongs . . . .	Sheriff of Forfar.
Saint Andrews, for the district to which it belongs . . . .	Sheriff of Fife.
Kirkcaldy, for the district to which it belongs . . . .	Sheriff of Fife.
Stirling, for the district to which it belongs . . . .	Sheriff of Stirling.
Kilmarnock, for the district to which it belongs . . . .	Sheriff of Ayr.
Haddington, for the district to which it belongs . . . .	Sheriff of Haddington.
Dumfries, for the district to which it belongs . . . .	Sheriff of Dumfries.
Wigton, for the district to which it belongs . . . .	Sheriff of Wigton.
Ayr, for the district to which it belongs . . . .	Sheriff of Ayr.
Falkirk, for the district to which it belongs . . . .	Sheriff of Stirling.

## SCHEDULE M.

## TOWNS TO RETURN TWO MEMBERS EACH.

**Edinburgh.**—From a point on the road from Leith to Queensferry which is distant four hundred yards, measured along such road, to the west of the point at which the same meets the Inverleith road at the house called Golden Acre, in a straight line to the north-western corner of the enclosure of John Watson's institution; thence in a straight line to the second stone bridge, marked No. 2, on the Union canal; thence in a straight line to the point at which the western wall of the enclosure of the lunatic asylum at Morningside meets the Jordan or Pow burn; thence down the Jordan or Pow burn to a point which is distant one

hundred and fifty yards, measured along such burn, below the arch over the same on the Carlisle road; thence in a straight line to the summit of Arthur's seat; thence in a straight line to the point at which the Feeder enters the western side of Lochend loch; thence in a straight line to the point at which Pilrig street joins Leith walk; thence along Pilrig street and the Bonnington road to the point at which the latter meets the road from Leith to Queensferry; thence along the road from Leith to Queensferry to the point first described.

*Glasgow.*—From the point, on the west of the town, at which the river Kelvin joins the river Clyde, up the river Kelvin to a point which is distant one hundred and fifty yards, measured along the river Kelvin, above the point at which the same is met by the Park wall which comes down thereto from Woodside road; thence in a straight line to a point on the Great canal which is distant one hundred yards, measured along the Great canal, below Derry bridge; thence along the Great canal and the Cut of Junction to the bridge over the Cut of Junction on the Stirling road; thence, eastward, along the Low Garngad road to a point which is distant one hundred and fifty yards, measured along the Low Garngad road, to the east of the bridge over the Grimston burn; thence in a straight line to a point on the road to Edinburgh by Airdrie which is distant one hundred yards, measured along the said road to Edinburgh, to the east of the point at which the same is joined by the road to Edinburgh through the village of Westmuir; thence in a straight line to the point at which the river Clyde is joined by Harvie's dyke; thence down the river Clyde to the point at which the same is joined by the Polmadie burn; thence up the Polmadie burn to the point at which the same is joined by the Little Govan burn; thence up the Little Govan burn to the point at which the same is divided into two branches in coming down from Govan Hill; thence in a straight line to the eastern extremity of the Butterbiggins road; thence along the Butterbiggins road, and in a line in continuation of the direction thereof, to the Kinninghouse burn; thence in a straight line to the Shields Bridge over the Paisley and Ardrossan Canal; thence in a straight line to the point at which the river Clyde is joined by the Plantation burn; thence down the river Clyde to the point first described.

#### TOWNS TO RETURN ONE MEMBER EACH.

*Aberdeen.*—From the point, on the northwest of the town, at which the Scatter burn joins the river Don, down the river Don to the point at which the same joins the sea; thence along the sea shore to the point at which the river Dee joins the sea; thence up the river Dee to a point which is distant one hundred yards, measured along the river Dee, above the bridge of Dee; thence in a straight line to the point at which the March between the parishes of Old Machar and Banchory Davenick crosses the Old Dee-side road; thence, northward, along the march between the parishes of Old Machar and Banchory Davenick, and Old Machar and Newhills, to the point first described.

*Paisley.*—From the summit of Byres Hill, on the northeast of the town, in a straight line to the point near Knock Hill at which the Renfrew road is joined by a road from Glasgow; thence in a straight line to the summit of Knock Hill; thence in a straight line to the northern gable of the Moss tollhouse on the Greenock road; thence in a straight line in the direction of the chimney of Linwood cotton mill to the point at which such straight line cuts the Candren burn; thence up the Candren burn to the point at which the same is joined by the Braidland burn, at the bridge over the same on the Johnstone road; thence up the Braidland burn to a point at which is distant five hundred yards, measured along the Braidland burn, above the said bridge; thence in a straight line to Melkieridge bridge over the Candren burn; thence in a straight line to the point at which the Old Neilston road leaves the New Neilston road; thence in a straight line to the summit of Dykebar Hill; thence in a straight line to a point which is one hundred yards due northeast of the summit of Bathgo Hill; thence in a straight line to the point first described.

*Dundee.*—From the point, on the east of the town, at which the shore of the firth of Tay would be cut by a straight line to be drawn from the tower (in Fife) of Mr Dalgleish of Scotsraig, to the point at which the Stobsmuir road is joined by the old road by Stobsmuir



and Clepington and the old Craigie road, in a straight line to the said point at which the Stobemuir road is joined by the old road by Stobemuir and Clepington and the old Craigie road; thence, westward, along the old road by Stobemuir and Clepington to the point called King's Cross, at which the several boundaries of the parishes of Dundee, Strathmartin, and Liff meet; thence in a straight line to a point on the Liff road, which is distant twelve hundred yards, measured along the Liff road, to the west of the point at which the Newtyle road leaves the same; thence in a straight line drawn due south to the shore of the firth of Tay; thence along the shore of the firth of Tay to the point first described.

*Greenock.*—From the point, on the west of the town, at which the shore of the firth of Clyde is met by the march between the parishes of Greenock and Innerkip, up the said march to that point thereof which is nearest to the southern point of the ridge of Bow Hill; thence in a straight line to the said point on Bow Hill; thence in a straight line to the southern end of the upper east reservoir for supplying Greenock with water; thence in a straight line in the direction of the highest projecting point of Knocknair Hill, to the point near Woodhead quarry, at which such straight line cuts the easternmost of the two rivulets which form the Lady burn; thence down such rivulet and the Lady burn to the point at which the same joins the firth of Clyde; thence along the shore of the firth of Clyde to the point first described.

*Perth.*—From the north-western corner of the North Inch, on the right bank of the river Tay, in a straight line to the bridge on the mill lead at the Boot of Balhousie; thence in a straight line to the bridge on the Glasgow road over the Scouring burn; thence in a straight line to the southern corner of the water reservoir of the Depot; thence in a straight line to the southern corner of the Friarton Pier on the river Tay; thence across the river Tay, passing to the south of the Friarton island, to the point at which the same is met by the boundary of the respective parishes of Kinfauns and Kinnoul; thence, northward, along the boundary of the parish of Kinfauns to the point at which the several boundaries of the properties of Kinfauns, Kinnoul, and Barnhill meet; thence in a straight line to the north-eastern corner of lord Kinnoul's lodge, at the gate of approach to Kinnoul hill; thence in a straight line to the north-eastern corner of the enclosure of the lunatic asylum; thence in a straight line to the point at which the Annatty burn crosses the Blairgowrie road; thence down the Annatty burn to the point at which the same joins the river Tay; thence in a straight line to the place first described.

#### DISTRICTS TO RETURN ONE MEMBER EACH.

##### 1.—WICK DISTRICT.

*Cromarty.*—From Samuel's Well, on the southwest of the town, in a straight line to the point at which the southern angle of the glebe meets the Inverness road; thence along the Inverness road to the point at which the same is met by the Den road; thence in a straight line to the Coal Hough well; thence in a straight line in the direction of Clachmalloch Rock to the point at which such straight line cuts the shore of the Cromarty firth; thence along the shore of the Cromarty firth to that point thereof which is nearest to Samuel's Well; thence in a straight line to Samuel's Well.

*Dingwall.*—From a point on the shore of the Cromarty firth which is distant one hundred yards, measured along the shore, to the south of the mouth of the canal, in a straight line to a point on the Inverness road which is distant five hundred yards, measured along the Inverness road, from the point, near the school-house, at which the same is joined by another road; thence in a straight line to a point on the Knockbain burn, which is distant four hundred and fifty yards, measured along the Knockbain burn, to the west of the point at which the same meets the main street of Dingwall; thence in a straight line to a point on the Drynie road which is distant one hundred yards, measured along the Drynie road, from the point at which the same leaves the new Strathpeffer road; thence in a straight line, drawn due east, to the shore of the Cromarty firth; thence along the shore of the Cromarty firth to the point first described.

*Dornoch.*—From the rock called Craig Carnaig, in a straight line to St Michael's Well,

close by the road to the Little Ferry; thence in a straight line to the point at which the road to the mound of Fleet leaves the road to Bonar bridge; thence in a straight line to the point at which the Black burn joins the Dornoch firth; thence along the shore of the Dornoch firth to Craig Carnaig.

*Kirkwall*.—From a point on the sea shore which is distant five hundred yards, measured along the shore, to the northeast of the north-eastern angle of Cromwell's Fort, in a straight line to a point on the Carness road which is distant seven hundred yards, measured along the Carness road, to the east of the point at which the same leaves the Birston road; thence in a straight line to a point on the Holm road, which is distant three hundred yards, measured along the Holm road, to the south of the point at which the same leaves the Deerness road; thence in a straight line to a point on the Scape road which is distant four hundred yards, measured along the Scape road, to the south of the point at which the same leaves the Stromness road; thence in a straight line to the western end of the Air Embankment; thence along the Air Embankment, and along the sea shore, to the point first described.

*Tain*.—From St Mary's Well, on the northwest of the town, in a straight line through the Raven's Well to a point five hundred yards beyond the same; thence in a straight line, drawn due southeast, to the Scotsburn road; thence in a straight line, drawn due east, to the Inverness road; thence in a straight line, drawn due northeast, to the river of Tain; thence down the river of Tain to the point at which the same joins the sea; thence along the sea shore to St Mary's Well.

*Wick*.—From the point, on the northeast of the town, at which the Papigoe burn joins the sea, in a straight line to a point on the Huna road which is distant two hundred and fifty yards, measured along the Huna road, to the north of the point at which the same leaves the Kettleburn road; thence in a straight line to the north-western corner of the Glebe; thence in a straight line to the point at which the Leuts Kerry burn joins the river Wick; thence up the Leuts Kerry burn to the point at which the same meets the Thurso road; thence in a straight line to the point at which the Inverness road would be cut by a straight line to be drawn thereto due west from the rock called "The Old Man of Wick;" thence in a straight line to the Old Man of Wick; thence along the sea shore to the point first described.

## 2.—INVERNESS DISTRICT.

*Forres*.—From Sueno's Stone, on the northeast of the town, in a straight line to the point at which two roads meet at the north-eastern corner of that part of the property of the burgh of Forres which is called "The Cluny Hills;" thence, southward, along the boundary of the property of the burgh to the point at which the same meets the Rafford road; thence in a straight line to a point on the Altyre road which is distant fifty yards, measured along the Altyre road, to the south of the point at which the same leaves a road to the mills of Burdeyards; thence in a straight line to a point on the Nairn road which is distant five hundred yards, measured along the Nairn road, to the west of the bridge of Forres; thence in a straight line to a point on the burn of Forres, which is distant four hundred yards, measured along the burn of Forres, below the Lee bridge; thence in a straight line to Sueno's Stone.

*Fortrose*.—From a point on the shore of the Moray firth, which is distant two hundred yards, measured along the shore, to the west of the pier of Fortrose, in a straight line to St Boniface's Well; thence in a straight line to the point at which the Rosemarkie burn would be cut by a straight line to be drawn thereto due northeast from St Boniface's Well; thence in a straight line to the rock called the Lady's Bathing House; thence along the shore of the Moray firth to the point first described.

*Inverness*.—From the Clachnaharry pier in a straight line to the point at which the Caledonian canal would be cut by a straight line to be drawn from the Clachnaharry pier to the southern extremity of the Upper Ness Island; thence in a straight line to a point which is two hundred and fifty yards due west of the point at which the Altna Skiah burn joins the river Ness; thence in a straight line to the point at which the Altna Skiah burn

joins the river Ness; thence up the Altna Skiah burn to a point which is distant three hundred and fifty yards, measured along the Altna Skiah burn, above the bridge over the same on the road to Fort Augustus; thence in a straight line to the point at which the road from Muirfield to King's mills leaves the old Edinburgh road; thence in a straight line, drawn due north, to the Nairn road; thence in a straight line to that point on the shore of the Moray firth which is due north of the northern angle of Cromwell's Fort; thence along the shore of the Moray firth to the Clachnaharry pier.

*Nairn*.—From the point, on the northwest of the town, at which the Western march of the Town's Links meets the shore of the Moray firth, in a straight line to a point on the Inverness road which is distant one hundred yards, measured along the Inverness road, to the south of the point at which the road to the Grove leaves the same; thence in a straight line to the sluice of the mill dam of the Nairn mills; thence in a straight line to a point on the Forres road which is distant six hundred yards, measured along the Forres road, from the Bridge of Nairn; thence in a straight line, drawn due north to the shore of the Moray firth; thence along the shore of the Moray firth to the point first described.

### 3.—ELGIN DISTRICT.

*Banff*.—From the rocks on the west of the town, called The Little Tumblers, in a straight line, drawn due south, to a point on the Gallow Hill, eight hundred and fifty yards distant; thence in a straight line to the point at which the Colleonard road leaves the Sandyhills road; thence in a straight line to the bridge over the river Dovert leading from the town of Banff to Macduff; thence up the river Dovert to a point which is distant two hundred yards, measured along the river Dovert, above the said bridge; thence in a straight line to a point on the road from Macduff to Aberdeen which is distant two hundred yards, measured along such road, to the south of the point at which the same is crossed by the Deyhill road; thence in a straight line to the mineral well of Tarlair; thence along the shore of the Moray firth to the Little Tumblers first described.

*Cullen*.—From the bridge over the burn of Cullen, on the Fochabers road, in a straight line to the point at which Slack's road meets the Seafield road; thence in a straight line to the point at which the Deskford road leaves the Banff road; thence in a straight line to the point at which the Loggie road would be cut by a straight line to be drawn thereto due south from the rock called the Maiden Paps; thence in a straight line to the Maiden Paps; thence along the sea shore to the point at which the same meets the burn of Cullen; thence up the burn of Cullen to the bridge over the same on the Fochabers road.

*Elgin*.—From the bridge on the Fochabers road over the Tayack burn, up the Tayack burn, to the point at which the same would be cut by a straight line to be drawn thereto due east from Palmer Cross bridge; thence in a straight line to Palmer Cross bridge; thence in a straight line to the point at which the river Lossie would be cut by a straight line to be drawn from Palmer Cross bridge to Sheriff Mill bridge; thence down the river Lossie to the bridge over the same on the road from Old Mills to Quarry Wood; thence along the road from Old Mills to Quarry Wood, to the point at which the same joins the road by Morristown to Lossiemouth; thence down the road by Morristown to Lossiemouth, to the point at which the same meets (at the cross of Bishop Mill) another road to Lossiemouth; thence in a straight line to the bridge first described.

*Inverury*.—From the bridge over the river Ury at the mill of Keith-hall, in a straight line through the fifteenth mile stone on the Aberdeen road, to a point four hundred yards beyond the same; thence in a straight line to the point at which the road to Howford leaves the Huntly road; thence in a straight line to the Upper Ford of Howford, on the river Ury; thence down the river Ury to the bridge first described.

*Kintore*.—From the point, on the southeast of the town, at which the burn of Tunch joins the river Don, up the burn of Tunch to the point at which the same is joined by the Torry burn; thence up the Torry burn to the bridge over the same on the Aberdeen road; thence in a straight line to the point at which the Hallforest road leaves the road to the Sheepcotes; thence in a straight line to the bridge over the Aberdeenshire canal

near the farm of Tilty; thence in a straight line to the point of the island in the lands of Balbithan, near the glebe; thence along the river Don, taking the northernmost branch thereof at the points at which the same is divided into two branches, to the point first described.

*Peterhead.*—From the north-western angle of the Salmon House at the mouth of the river Ugie, and on the northwest of the town, in a straight line to the point near Clarke Hill, at which the Old Kinnmundy road is joined by a road leading therefrom into the Auchtygall road; thence along the road so leading into the Auchtygall road to the point at which the same joins the Auchtygall road; thence eastward, along the Auchtygall road, and in a line in continuation of the direction thereof, to the sea shore; thence along the sea shore to that point thereof which is nearest to the point first described; thence in a straight line to the point first described.

#### 4.—MONTROSE DISTRICT.

*Aberbrothwick.*—From the point at which the sea shore would be cut by a straight line to be drawn from the Bell Rock light-house to the point, near Timmer Green, at which the road to Hospital Field leaves the Arbirlot road, along the said straight line to the said point at which the road to Hospital Field leaves the Arbirlot road; thence, northward, along the Arbirlot road to the point at which the same is met by a road leading thereto from the Forfar road which is distant one hundred and fifty yards along the Forfar road to the north of the first mile stone from Aberbrothwick, at the old toll house; thence in a straight line to the bridge over the Feeder of the Tarry burn on the Montrose road; thence along the said Feeder to the point at which the same reaches the spring at Old Tarry; thence down the Tarry burn to the point at which the same joins the sea; thence along the sea shore to the point first described.

*Brechin.*—From the point, on the south of the town, at which the Skinner's burn joins the South Esk river, down the South Esk river to the West Den of Leuchland; thence up the hollow of the West Den of Leuchland, and up Barrie's burn, to the point, near the source of Barrie's burn, at which the several boundaries of the properties of Caldham, Pitforthie, and Unthank meet; thence in a straight line, in a westerly direction, to the point at which the several boundaries of the properties of Maisondieu and Cookston, and Mr Mitchell's land meet; thence in a southwest direction, along the boundary of the Maisondieu property to the point at which the same meets the Menmuir road; thence in a straight line to the westernmost point at which the Skinner's burn crosses the Forfar road; thence down the Skinner's burn to the point first described.

*Forfar.*—From the Inch-ma-coble Stone, on the southern bank of the Loch of Forfar, in a straight line to the point at which the Orchard loan joins the Perth road; thence in a straight line through the point at which the Westfield loan joins the Dundee road to the Balminshanner march; thence in a straight line to the Blind Well at the junction of the road from Forfar to Lower with the Old Kirk road from Lower; thence in a straight line to the spring on the Arbroath road at the junction of the boundaries of Pitruchie and the poor's ground; thence in a straight line to the point at which the old road to Brechin leaves the east road to Carseburn; thence in a straight line to the point at which the west road to Carseburn leaves the Hasockwall road; thence in a straight line to the point at which the new Kirriemuir road leaves the new Brechin road; thence in a straight line to the Inch-ma-coble Stone.

*Inverbervie.*—From the point, on the east of the town, at which the Bervie burn joins the sea, up the Bervie burn to the point at which the same is met by the boundary of the parish of Arbuthnot; thence, southward, along the boundary of the parish of Arbuthnot to the point (near Dendodrum) at which the same meets the boundary which separates the town lands from the property of Mr Farquhar; thence in a straight line to the point at which the several boundaries of the Glebe land, the land of the Town's Muir, and the property of Mr Farquhar, meet; thence in a straight line through the south-western corner of the old castle of Hall Green to the sea shore; thence along the sea shore to the point first described.

*Montrose.*—From the point, on the northeast of the town, at which the town's loaning

meets the sea shore, westward, along the town's loosing, and in a line in continuation of the direction thereof, to the point at which such line cuts the Laurencekirk road; thence in a straight line to the bridge over the burn of Tayock on the Brechin road; thence down the channel of the burn of Tayock at low water to the point at which the same joins the south Esk river; thence down the south Esk river, including the Rossie Island, to the point at which the same river joins the sea; thence along the sea shore to the point first described.

#### 5.—ST ANDREWS DISTRICT.

*Easter Anstruther.*—From the point at which the Dreel burn joins the Firth of Forth, up the Dreel burn to the point at which the mill dam of the mill of Anstruther branches off; thence in a straight line in the direction of the spire of Kilrenny church to the point at which such straight line cuts the Cunzie burn; thence in a straight line to the point at which the road leading to St Andrews (being the march between the lands of Renny Hill and the barony of Anstruther) leaves the turnpike road to Upper Kilrenny; thence in a straight line to the point at which the Cellardyke burn enters the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Wester Anstruther.*—From the rock called the Caniger Stone in a straight line to the point at which the Dreel burn crosses the road from Pittenweem to Grangeunair farm; thence down the Dreel burn to the point at which the same joins the Firth of Forth; thence along the shore of the Firth of Forth to the Cuniger Stone.

*Craik.*—From a point on the shore of the Firth of Forth which is distant five hundred yards (measured along the shore) to the southwest of the Almond Rocks, in a straight line, drawn due northwest, to the point at which such straight line cuts the road to Anstruther and Kilrenny; thence in a straight line to the point at which the St Andrews' road would be cut by a straight line to be drawn thereto from North Berwick Law through the point last described; thence in a straight line to a point on the Craighhead road, which is distant five hundred yards (measured along the Craighhead road) to the northeast of the bridge on the same, over the Lammas Green burn; thence in a straight line in the direction of the north-eastermost point of the Rome Rocks until it meets the shore of the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Cupar.*—From a point on the southern branch of the river Eden which is distant four hundred yards (measured along such river) below the new bridge, in a straight line, through a point on the Dundee road which is distant two hundred and fifty yards (measured along the Dundee road) to the east of the mile stone marked 0 miles from Cupar and twenty-two miles from Pettycur, to a point two hundred and fifty yards distant from the said point on the Dundee road; thence in a straight line to the north-western corner of the garden wall of Dalziel lodge on the old Dundee road; thence in a straight line to the bridge over the St Mary's burn on the Newburgh road; thence in a straight line to the point at which the Ferrybank road would be cut by a straight line to be drawn from the Hopetoun monument to the winter or byewater sluice at the western end of Anderson's spinning mills; thence in a straight line to the said sluice; thence in a straight line to the mile stone on the Edinburgh road marked one mile from Cupar and twenty-one miles from Pettycur; thence in a straight line to the point first described.

*Kilrenny.*—From the point at which the Cellardykes burn joins the Firth of Forth in a straight line to the point at which the road leading to St Andrews (being the march between the lands of Rennyhill and the barony of Anstruther) leaves the turnpike road from Anstruther to upper Kilrenny; thence in a straight line to the Skelth stone; thence in a straight line to the point at which the Gelly burn meets the wall of Spa burn; thence in a straight line to a point on the Craik road which is distant four hundred yards (measured along the Craik road) to the northeast of the bridge on the same over the Gelly burn; thence in a straight line to a point on the Gelly burn which is distant three hundred yards (measured along the Gelly burn) below the said bridge on the Craik road; thence down the Gelly burn to the point at which the same joins the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Pittenweem.*—From a point on the southwest of the town, on the sea shore, distant from

the Sandy Craig six hundred yards (measured westwards along the sea shore,) in a straight line drawn to a point on the Mires or Dreel burn six hundred yards (measured up the course thereof) above the point where it is crossed by the road to Carnbee and St Andrews; thence down the Mires or Dreel burn to the point at which the same crosses the road to Grange-muir farm; thence in a straight line to the rock called the Cudger Stone; thence along the shore of the Firth of Forth to the point first described.

*St Andrews.*—From the point at which the Swilkin burn joins the sea, up the Swilkin burn, to a point which is distant three hundred yards (measured along the Swilkin burn) above the bridge over the same on the Cupar road; thence in a straight line through a point on the Kinghorn road, which is distant four hundred yards (measured along the Kinghorn road) from the point at which the same leaves Argyle street, to the point at which such straight line cuts the Kinness burn; thence in a straight line to the bridge over the St Nicholas burn on the Grail road; thence in a straight line, drawn due east, to the sea shore; thence along the sea shore to the point first described.

#### 6.—KIRKALDY DISTRICT.

*Burntisland.*—From the northern extremity of the dam dyke of the Sea mills, in a straight line, drawn due north, to the road from Aberdour to Kirkaldy; thence in a straight line to a point on the road from Aberdour to Kirkaldy, which is distant three hundred yards (measured along such road) to the east of the point at which the same is met by the road from Burntisland to Kinross; thence in a straight line, in the direction of the eastern extremity of Inchkeith, to the point at which such straight line cuts the shore of the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Dysart.*—From the point, on the south of Pathhead, at which the East burn joins the Firth of Forth, up the East burn to that point thereof which is nearest to the eastern angle of the engine house of the Dunnikier colliery; thence in a straight line to the point at which the road from Parkhead to Mitchelston's farm meets the road from Gallatown to Dunnikier; thence in a straight line to a point on the Cupar road, which is distant three hundred and fifty yards (measured along the Cupar road) to the northwest of the point (in the street of Gallatown) at which the road from Gallatown to West Wemyss leaves the same; thence in a straight line to the cliff above the Pising Mare well; thence along the shore of the Firth of Forth to the point first described.

*Kinghorn.*—From the rock called Hoch-ma-toch, in a straight line to the point at which the road to Kirkaldy from Burntisland joins the road to Kirkaldy from Pettycur; thence in a straight line to the outlet from the loch of Kinghorn called the Gullet Sluice; thence in a straight line to the rock on the shore of the Firth of Forth above the Well of Spa; thence in a straight line to the Well of Spa; thence along the shore of the Firth of Forth to the rock Hoch-ma-toch.

*Kirkaldy.*—From the point, on the northeast of the town, at which the East burn joins the Firth of Forth, up the East burn to that point thereof which is nearest to the eastern angle of the engine house of the Dunnikier colliery; thence in a straight line, in the direction of the spire of Abbotshall church, to the point at which such straight line cuts a road from Kirkaldy to Raith and Auchtertool; thence along the said road to Raith and Auchtertool, to the point (opposite Raith gate) at which the same is joined by the road from West Bridge to Auchtertool; thence in a straight line to the western corner of the old quarry above the West mills of Linktown, and on the left bank of the West burn; thence in a straight line to a point on the Kinghorn road, which is distant five hundred yards (measured along the Kinghorn road) to the south of the point (in West Bridge Town) at which the Queensferry road leaves the same; thence in a straight line, in the direction of North Berwick Law, to the point at which such straight line cuts the shore of the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

#### 7.—STIRLING DISTRICT.

*Culross.*—From the point, close to the shore, at which the Dean burn crosses the high

road to Kincardine, up the Dean burn to that point thereof which is nearest the ruins of the old church; thence in a straight line to the point at which the road to Dunfermline by the Abbey lodge leaves the road from Calross church to Kincardine; thence along the said road to Dunfermline, to a point which is distant seven hundred yards (measured along such road) from the point last described; thence in a straight line, through the stone which marks the eastern extremity of the royalty of the burgh, to the shore of the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Dunfermline*.—From the point on the south of the town, near the southern end of St Leonards, at which the Queensferry road leaves the Burntisland road, in a straight line to the head of the mill dam of the Brucefield spinning mills; thence in a straight line to the point at which the Townhill road is joined by a road from Headwell; thence in a straight line to a point on the Crieff road, which is distant one hundred and fifty yards (measured along the Crieff road) to the north of the bridge on the same over the Blair Castle or Broomhill burn; thence in a straight line to the bridge over the Baldrige burn at Blackburn; thence in a straight line to the point at which the Elgin railway crosses the Carnack road; thence in a straight line to Urquhart bridge on the Stirling road; thence in a straight line to the bridge over the Spittal burn, on the Limekilns road; thence in a straight line to the point first described.

*Inverkeithing*.—From the point, on the west of the town, at which the Seggs burn joins the sea, up the Seggs burn to a point which is distant one hundred yards (measured along the Seggs burn) above the bridge over the same on the Queensferry road; thence in a straight line to a point on the Dunfermline road, which is distant three hundred yards (measured along the Dunfermline road) from the point at which the same leaves the High street of Inverkeithing; thence in a straight line to the bridge over the Inverkeithing burn on the Perth road; thence in a straight line through the Flagstaff near the East Ness to the sea shore, thence along the sea shore to the point first described.

*Queensferry*.—From a point on the shore of the Firth of Forth, which is distant three hundred yards (measured along the shore) to the east of the Newhall pier, in a straight line, in a southerly direction, drawn from the eastern extremity of Inch Garvie, through the point last described, to a point which is one hundred yards beyond the middle of the Edinburgh road; thence in a straight line to the south-eastern corner of the reservoir; thence in a straight line to the Dovecote Park well; thence in a straight line to the point at which the Echland burn crosses the road to Echland and Linnithgow; thence down the Echland burn, to the point at which the same joins the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Stirling*.—From the point, on the east of the town, at which the Town burn joins the river Forth, up the river Forth to the point at which the same is joined by the Kildean burn; thence up the Kildean burn, to the point at which the same reaches the dam of the Kildean mill; thence in a straight line to the point opposite the lodge of Christian Bank, at which the road to Touch and Gartur leaves the road to Murray's Hall; thence in a straight line to the point at which the road from Cambusbarron to St Ninians is joined by a road from Newhouse and Torbrecks; thence in a straight line to a point on the old Glasgow road, which is distant five hundred yards (measured along the Glasgow road) to the south of the point at which the Glasgow road leaves the Edinburgh road; thence in a straight line to a point on the Edinburgh road, which is distant five hundred yards (measured along the Edinburgh road) to the southeast of the point at which the same leaves the Glasgow road; thence in a straight line, in the direction of Cambuskenneth abbey, to the point at which such straight line cuts the Pelstream; thence along the Pelstream, and along the continuation thereof, called the Town burn, to a point which is distant five hundred yards (measured along the Town burn) to the south of the bridge over the same at Hadaway's carpet factory; thence in a straight line to the point first described.

#### 8.—KILMARNOCK DISTRICT.

*Dumbarton*.—From the point, on the southeast of the town, at which the Gruggies burn joins the Firth of Clyde, up the Gruggies burn to the bridge on the road from Dum-

barren to Glasgow; thence in a straight line, drawn due northeast, to the road from Bar toll to Glasgow; thence, northward, along the road from Bar toll to Glasgow to the point at which the same meets the Bonhill road; thence, northward, along the Bonhill road to a point which is distant two hundred yards (measured along the Bonhill road) from the point last described; thence, westward, in a straight line to a point on the Helensburgh road which is distant two hundred and fifty yards (measured along the Helensburgh road) from the point at which the same leaves the Luss road; thence in a straight line, drawn due southwest, to the shore of the Firth of Clyde; thence along the shore of the Firth of Clyde to the point first described.

*Kilmarnock.*—From the point, on the south of the town, at which Kilmarnock water joins the river Irvine, in a straight line to a point on the Irvine road which is distant three hundred and fifty yards (measured along the Irvine road) to the west of the point at which the same leaves Grange street; thence in a straight line to the point at which the road to Hill Head leaves the Kilmaurs road; thence in a straight line, through the summit of the Bonfire knowe, to the Kilmarnock water; thence in a straight line to the bridge over the Mill burn on the Mauchline road; thence down the Mill burn to the point at which the same joins the river Irvine; thence in a straight line to the Bell's Land bridge on the road from Rincart to Galston; thence in a straight line to the point called Witch Knowe, at which two roads meet; thence in a straight line to the bridge over the Maxholm burn on the Air road; thence down the Maxholm burn to the point at which the same joins the river Irvine; thence down the river Irvine to the point first described.

*Renfrew.*—From the Milburn bridge over the Pudzeoch burn on the Glasgow road, in a straight line to a point up the Pudzeoch burn which is distant three hundred yards in a straight line from the said bridge; thence in a straight line to a point on the Greenock road which is distant two hundred and fifty yards (measured along the Greenock road) from the point at which the same leaves the Paisley road; thence in a straight line to a point on the river Clyde, which is distant three hundred yards (measured along the river Clyde) below the point at which the same is joined by the Canal; thence along the river Clyde to the point at which the same is joined by the Canal; thence along the Canal to the point at which the same is joined by the Pudzeoch burn; thence along the Pudzeoch burn to the bridge aforesaid.

*Rutherglen.*—From the point at which the river Clyde is joined by the Polmadie burn, up the river Clyde, to Dalmarnock bridge; thence in a straight line through the point at which the road from Dalmarnock bridge to Muirkirk leaves the road from Dalmarnock bridge to Hamilton, to the point at which such straight line reaches the southern road from Rutherglen to Hamilton; thence in a straight line to a point in the Castlemilk road which is distant seven hundred yards (measured along the Castlemilk road) from the point at which the same joins the main street of Rutherglen; thence in a straight line to a point on the Newhouse road, which is distant three hundred yards (measured along the Newhouse road) from the point at which the same leaves the Hangingshaws road; thence in a straight line to the bridge over the Polmadie burn on the Glasgow road; thence down the Polmadie burn to the point first described.

*Port Glasgow.*—From the point on the shore, west of the town, where Devols burn enters the Firth of Clyde, up the said burn to the waterfall in Devols glen; thence in a straight line to a point in the Mill Dam burn which is one thousand yards, measured along the same, above the point where it enters the Clyde; thence in a straight line to a point on the boundary between the parishes of Port Glasgow and Kilmarcolm which is distant eight hundred yards, measured along the said boundary, from the point where it meets the Clyde; thence down the said boundary to its termination on the shore; thence west along the shore to the point first described.

#### 9. HADDINGTON DISTRICT.

*North Berwick.*—From the Yellow Craig in a straight line to the point at which the



Dunbar road would be cut by a straight line to be drawn thereto from the Isle of May lighthouse through the Yellow Craig; thence in a straight line to a point two hundred yards to the south of the middle of the Edinburgh road in the direction of a line drawn from the westernmost point of Craig Leith through the easternmost point of the rock called Craig-in-Touch or Powart rock; thence in a straight line, in the direction of the said easternmost point of the rock called Craig-in-Touch or Powart rock, to the point at which such straight line cuts the shore of the Firth of Forth; thence along the shore of the Firth of Forth to the Yellow Craig.

*Dunbar.*—From the point on the southeast of the town at which the eastern boundary of the town land meets the sea coast, along the eastern boundary of the town land, to the point at which the same meets the Berwick road; thence in a straight line, in the direction of the Hopetoun monument near Haddington, to the point at which such straight line cuts the road from Bowerhouse to Belhaven; thence along the road from Bowerhouse to Belhaven, to the point at which the same meets the Belhaven burn; thence down the Belhaven burn to the point at which the same reaches the sea; thence along the sea coast to the point first described.

*Haddington.*—From a point on the Dunbar road, which is distant two hundred yards, (measured along the Dunbar road) to the east of the point at which the Athelstonford road leaves the same, in a straight line to the north-eastern corner of the burial ground of St Martin's chapel; thence along the lane which leads to St Martin's chapel from the Moreham road, to the point at which such lane joins the Moreham road; thence in a straight line to a point on the Gifford road, which is distant two hundred yards (measured along the Gifford road) to the south of the point at which the same leaves the Moreham road; thence in a straight line to the point at which the river Tyne would be cut by a straight line to be drawn from the point last described to the northern end of Waterloo bridge; thence up the river Tyne to the Burgh milldam; thence in a straight line to a point on the Pencaitland road, which is distant five hundred yards (measured along the Pencaitland road) to the west of the point at which the same leaves the High street of Haddington; thence in a straight line to the north-western corner of the premises of Bellevue, the westernmost of the Gallow Green feus; thence in a straight line to the point at which the road from Whisky row, by the eastern side of the glebe, is met by a cross road leading therefrom by Goatfield to the Athelstonford road; thence along the said cross road to the point at which the same joins the Athelstonford road; thence in a straight line to the point first described.

*Jedburgh.*—From the flour mill bridge over the river Jed, on the northeast of the town, in a straight line to the point at which the footpath from Timpen Dean joins the Tatches Baulk road; thence westward, along the Tatches Baulk road to the point at which the same meets the Tudhope Loaning; thence in a straight line to a point on the Hawick road, which is distant three hundred yards (measured along the Hawick road) to the southwest of the north-western angle of the enclosure of the castle; thence in a straight line to the Inchbonnie or second bridge over the river Jed; thence in a straight line to the point at which the new road to Oxnam joins the old road to Oxnam; thence in a straight line to the said flour mill bridge.

*Lauder.*—From a point on the Kelso road which is distant six hundred yards (measured along the Kelso road) from the church of Lauder, in a straight line to a point on the Lauder burn, which is distant three hundred and fifty yards (measured along the Lauder burn) below the bridge over the same on the road to Woodhead and Gattonside; thence up the Lauder burn to the said bridge; thence in a straight line to a point on the Washing burn, which is distant two hundred yards (measured along the Washing burn) above the bridge over the same on the Edinburgh road; thence down the Washing burn to the point at which the same meets the park wall of Thirlestane; thence eastward, along the park wall of Thirlestane to the point at which the same reaches the Kelso road; thence along the Kelso road to the point first described.

## 10.—LEITH DISTRICT.

*Leith*.—From the point at which the shore of the Firth of Forth would be cut by a straight line to be drawn thereto from the spire of the Tron church in Edinburgh through the point at which the Feeder joins the western side of Lochend loch, in a straight line to the said point at which the Feeder joins the western side of Lochend loch; thence in a straight line to the point at which Pilrig street joins Leith walk; thence along Pilrig street and the Bonnington road to the point at which the latter joins the Queensferry road; thence westward, along the Queensferry road to a point which is distant four hundred yards (measured along the Queensferry road) to the west of the point at which the same meets the Inverleith road at the house called Golden Acre; thence in a straight line to the point at which the Wardle burn joins the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Musselburgh*.—From the point at which the Magdalene burn joins the Firth of Forth, up the Magdalene burn to a point which is distant fifty yards (measured along the Magdalene burn) above Magdalene bridge; thence in a straight line, in the direction of the spire of Inverleith church, to the point at which such straight line cuts the river Esk; thence in a straight line to a point in the road from Newbigging to Inverleith, which is distant two hundred yards (measured along such road) to the south of the point (in the street of Newbigging) at which the same leaves the road from Newbigging to Haddington and Prestonpans; thence in a straight line through the seventh mile stone on the road from Edinburgh to Haddington, to the Ravenshaugh burn; thence down the Ravenshaugh burn to the point at which the same joins the Firth of Forth; thence along the shore of the Firth of Forth to the point first described.

*Portobello*.—From the fountain of Salt pans on the Musselburgh road, southward, in a straight line (in the direction of a straight line drawn from the east end of Inchkeith) to a point one hundred and fifty yards distant; thence in a straight line, in the direction of Nelson's monument on the Calton hill, to the point at which such straight line cuts the Duddingston road; thence northward, along the Duddingston road, to the point at which the same meets the Edinburgh road; thence in a straight line to the point at which the shore of the Firth of Forth would be cut by a straight line to be drawn thereto from the summit of Arthur's Seat through the point last described, thence along the shore of the Firth of Forth to the point first described.

## 11.—FALKIRK DISTRICT.

*Airdrie*.—From the bridge over the South Burn on the Glasgow road, along the South Burn, to a point which is distant five hundred yards (measured along the South Burn) to the east of the said bridge; thence in a straight line to a point on the Gartlee road, which is distant five hundred yards (measured along the Gartlee road) to the south of the point at which the same meets Graham street; thence in a straight line to a point on the high road from Carlisle to Stirling, which is distant one hundred yards (measured along such road) to the south of the point at which the same meets the Edinburgh road; thence along the said road to Stirling, to the bridge on the same over the north burn; thence in a straight line to a point on the road from North Bridge street to New Monkland church, which is distant five hundred yards (measured along such road) to the north of the bridge on the same over the North Burn; thence in a straight line to the bridge over the railway on the Kirkintilloch road near Windhall; thence in a straight line to the bridge first described.

*Falkirk*.—From a point on the Edinburgh road which is distant four hundred yards (measured along the Edinburgh road) to the east of the bridge on the same over the East or Meadow or Lady's Mill burn, in a straight line to the bridge on the Grangemouth road over the same burn; thence along the said burn, to the point at which the same passes under the Forth and Clyde canal; thence, eastward, along the Forth and Clyde canal to the point at which the same meets the road to Dalderse House; thence, northward, along the

road to Dalderse House to a point which is distant three hundred yards (measured along the road to Dalderse House) from the point last described; thence in a straight line to a point on the Alloa and Carron road, which is distant two hundred yards (measured along the Alloa and Carron road) from the point at which the same meets St David's lane; thence along the Alloa and Carron road to the point at which the same meets St David's lane; thence along the road to Burnhouse to the point at which the same meets the West burn; thence in a straight line to the twenty-fourth mile stone on the Stirling road; thence in a straight line to a point on the road by Burnhead and Gartcows to South Bantaskine, which is distant one hundred yards (measured along such road) to the southwest of the point at which the same is met by the West burn; thence in a straight line to the south-eastern corner of the Parkfoot washing green; thence in a straight line to the point first described.

*Hamilton.*—From Covan burn bridge, on the road to Lanark, in a straight line to the point in the lower park wall of Hamilton palace, where it meets the great south avenue of the said palace; thence, westward, along the said wall to a point in the same six hundred yards beyond the intersection of the Cambuslang and Glasgow road within the said wall; thence in a straight line to the bridge on the said road over Wellhall burn; thence up the said burn to the point where it is met by the march fence between the burgh and the lands of Over Auchingraymont; thence southward along the said fence to the point where it meets the road to Earnock; thence in a straight line, through a point on the road to Strathaven, which is five hundred and twenty yards (measured along the said road) south of the Butterburn bridge, continued until it meets the upper park wall of Hamilton palace; thence, eastward, along the said park wall to the point where it meets the Covan burn; thence down the same to the point first described.

*Lanark.*—From a point on the river Clyde which is distant one hundred and fifty yards (measured along the river Clyde) below the bridge over the same on the southern branch of the Glasgow road, in a straight line to a point on the old road to Carluke, which is distant one hundred and fifty yards (measured along such old road) from the point at which the same leaves the Glasgow road; thence in a straight line to the point, near Mansfield, at which the Jerviswood road leaves the northern Edinburgh road; thence in a straight line to a point on the southern Edinburgh road which is distant one hundred yards (measured along such road) to the east of the eastern corner of Brown's square; thence in a straight line to the centre of the ruins of the parish church; thence in a straight line to a point on the river Clyde which is distant seven hundred and fifty yards (measured along the river Clyde) above the bridge over the same on the southern branch of the Glasgow road; thence down the river Clyde to the point first described.

*Linlithgow.*—From a point on the Union canal which is distant one hundred and fifty yards (measured along the Union canal) to the northeast of the Aqueduct over the Edinburgh road, in a straight line to the point at which the burn joins the eastern end of Linlithgow loch; thence along the southern shore of Linlithgow loch to the point at which the same is joined by the burn which runs therefrom across the Borrowstownness road; thence along the last mentioned burn to the bridge over the same on the Borrowstownness road; thence in a straight line to a point on the Falkirk road which is distant one hundred and fifty yards (measured along the Falkirk road) from the point at which the Torphichen road leaves the same; thence in a straight line to the bridge marked No. 45, over the Union canal on the Bathgate road; thence in a straight line to the Aqueduct over the Edinburgh road; thence along the Union canal to the point first described.

## 12.—AYR DISTRICT.

*Ayr.*—From the end of the mill-dam dyke on the right bank of the river Ayr, and on the east of the town, in a straight line to the Hawkhill bridge; thence along the road which passes the south-eastern side of the Newton muir, and in a line in continuation of the direction of such road, to the Half-mile burn; thence down the Half-mile burn to the point at which the same joins the Firth of Clyde; thence along the shore of the Firth of Clyde to the point at which the same is met by the road which runs thereto from the Holmstone tell bar, past the race course, and between the lands of Blackburn and Seafield; thence along

the road last described to a point which is distant two hundred and sixty yards (measured along the same) to the east of the point at which the same crosses the old Maybole road; thence in a straight line to the point first described.

*Campbelltown*.—From the point, on the southeast of the town, at which the Kilkerran burn joins the sea, up the Kilkerran burn to the point at which the same coming down from Bengoillan nearly forms a right angle in turning towards the sea; thence in a straight line to the summit of the hill called Barley Bannocks; thence in a right line to the bridge over the Witch burn on the Southend road; thence in a straight line to the point at which the road to Knockscabert leaves the Inverary west road; thence in a straight line to the first point of the rock on Balligeggan hill; thence in a straight line in the direction of the summit of the island of Avarr, to the point at which such straight line cuts the Baraskomil burn; thence down the Baraskomil burn to the point at which the same joins the sea; thence along the sea shore to the point first described.

*Inverary*.—From the western angle of Point House, on the west of the town, in a straight line to a point which is distant three hundred yards due north of the same; thence in a straight line to the point at which the Dalnally road meets the upper or great avenue to Inverary castle; thence in a straight line to a point on the shore of Loch Fine, which is distant one hundred and fifty yards (measured along the shore) to the east of the north end of the Pier; thence along the shore of Loch Fine to that point thereof which is nearest to the point first described; thence in a straight line to the point first described.

*Irvine*.—From the flagstaff near the junction of the river Irvine with the sea (about one hundred yards south of the point where the Pier Head leaves the shore) in a straight line, through the stone at the western corner of the march fence of the minister's glebe, to the river Anwick: thence up the river Anwick to a point which is distant two hundred and ninety-five yards (measured along the river Anwick) above the bridge over the same on the Kilmarnock road; thence in a straight line, in the north-westerly direction, to the point at which the burn called "The Minister's Cast" makes an angle in turning to the west; thence down The Minister's Cast to the point at which the same joins the river Irvine; thence down the river Irvine to that point thereof which is nearest to the flagstaff aforesaid; thence in a straight line to the flagstaff aforesaid.

*Oban*.—The space on the main-land included within a circle described with a radius of one half mile from the point as a centre where the street leading to the old Inverary road meets the street along the shore.

### 13.—DUMFRIES DISTRICT.

*Annan*.—From the point, on the north of the town, at which the Galla Bank burn joins the river Annan, in a straight line to a point on the Prestonfield road which is distant one hundred yards (measured along the Prestonfield road) from the point at which the same leaves the Prestonhall road; thence in a straight line to the point near New Dyke at which the Langholm road leaves the Carlisle road; thence in a straight line through the Blindpeat well to the river Annan; thence up the river Annan to the point first described.

*Dumfries*.—From the point, on the north of the town, at which the townhead branch of the Edinburgh road joins the English street branch of the same road, in a straight line to the bridge over the Maryholm burn on the Lincluden road; thence in a straight line to a point on the Terregles road, which is distant five hundred yards (measured along Terregles street and the Terregles road) from the point at which Terregles street meets Galloway street; thence in a straight line to the point at which the Castle Douglas road leaves the Dalbeaty road; thence in a straight line to the point at which the left bank of the river Nith is cut by a straight line drawn thereto due west from the Maiden's Bower Craig; thence along the last mentioned straight line to the point at which the same cuts the Caerlaverock road; thence in a straight line to the point at which the road to Gill brae leaves the road to Gallside; thence in a straight line to a point which is distant one hundred yards due east from the point first described; thence in a straight line to the point first described.

*Kirkcudbright*.—From the point, on the west of the town, at which the river Dee would be cut by a line to be drawn thereto parallel to the High Street leading from the Market

cross to Bar Hill, from the point at which the new road to St Mary's Isle leaves the road to Dundrennan; thence in a straight line to a point which is four hundred yards beyond the same; thence in a straight line to a point which is seven hundred yards due east of the northern extremity of the Stirling Acres Embankment; thence in a straight line to the northern extremity of the Stirling Acres Embankment; thence down the river Dee to the point first described.

*Lochmaben*.—From the point, on the northeast of the town, near Bogle-hole, at which a burn crosses the road to the bridge on Kennal water, in a straight line to a point on the bank of the Castle loch which is distant five hundred yards in a straight line to the southeast of the summit of the knoll of the old castle; thence in a straight line to the summit of the knoll of the old castle; thence in a straight line to a point on the Dumfries road which is distant five hundred yards (measured along the Dumfries road) to the west of the Town house; thence in a straight line to a point which is four hundred yards due west of the point first described; thence in a straight line to the point first described.

*Sanguhar*.—From the point, on the south of the town, at which the Town-fit burn joins the river Nith, up the Town-fit burn to a point which is distant two hundred and fifty yards (measured along such burn) to the north of the point at which the same crosses the Dumfries road; thence in a straight line to the bridge over the Crawick burn on the Whitehill road; thence down the Crawick burn to the point at which the same joins the river Nith; thence along the river Nith to the point first described.

#### 14.—WIGTON DISTRICT.

*New Galloway*.—From a point on the road to Kells church, which is distant five hundred yards (measured along such road) to the north of the north-western corner of the Town house, in a straight line drawn due east to a point three hundred yards distant; thence in a straight line to a point which is distant three hundred yards due west from a point on the Kirkcudbright road, which is distant four hundred yards (measured along the Kirkcudbright road) to the south of the Town house; thence in a straight line, through the said point on the Kirkcudbright road, to a point which is distant three hundred yards due west therefrom; thence in a straight line to a point which is distant three hundred yards due west from the point first described; thence in a straight line to the point first described.

*Stranraer*.—From that point on the shore of Loch Ryan which is due northeast of the point at which the two roads from Stranraer to Leswalt meet, in a straight line, through the point at which such two roads meet, to a point seven hundred yards beyond the same; thence in a straight line to the point at which the road from the church to Portpatrick meets the road from the meeting-house to Portpatrick; thence in a straight line to a point on the Dumfries road which is distant seven hundred yards (measured along the Dumfries road) from the point at which the same is met by the road from the meeting-house to Portpatrick; thence in a straight line, drawn due northeast, to the shore of Loch Ryan; thence along the shore of Loch Ryan to the point first described.

*Whithorn*.—From a point on the Portwilliam road, which is distant two hundred yards (measured along the Portwilliam road) to the west of the point at which the same leaves the Wigton road, in a straight line to a point on the Glasserton road, which is distant five hundred yards (measured along the Glasserton road) from the point at which the Isle of Whithorn road leaves the same; thence in a straight line to a point on the Isle of Whithorn road, which is distant five hundred yards (measured along the Isle of Whithorn road) from the point at which the same leaves the Glasserton road; thence in a straight line to a point on the road or street called the Raw, leading in a southeasterly direction from the Town House, five hundred yards distant therefrom (measured along the said road); thence in a straight line to a point on the Garlieston road, which is distant two hundred yards (measured along the Garlieston road) from the point at which the same leaves the Wigton road; thence in a straight line to the point first described.

*Wigton*.—From a point on the sea shore, on the northeast of the town, which is distant four hundred yards (measured along the shore) to the north of the point at which the Croft-en-Reich burn joins the sea, in a straight line to the point at Trammond ford, at which

the Glenluce road meets a road to Bladenoch; thence in a straight line to a point on the Bladenoch water, which is distant one hundred yards (measured along the Bladenoch water) above Bladenoch bridge; thence down the Bladenoch water to the point at which the same joins the sea; thence along the sea shore to the point first described.

We now proceed to lay before the reader a copy of the Irish Reform Bill, which received the royal assent on the 7th August, 1832.

#### AN ACT TO AMEND THE REPRESENTATION OF THE PEOPLE OF IRELAND.

WHEREAS it is expedient to extend the elective franchise to many of his majesty's subjects in Ireland who have not heretofore enjoyed the same, and to increase the number of representatives for certain cities and boroughs in that part of the united kingdom, and to diminish the expenses of elections therein; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, in addition to the persons now by law qualified to vote at the election of knights of the shire for the several counties in Ireland, every male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, whether determinable on a life or lives or not, and having a beneficial interest therein of the clear yearly value of not less than ten pounds over and above all rent and charges, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than fourteen years, whether determinable on a life or lives or not, and having a beneficial interest therein of the clear yearly value of not less than twenty pounds over and above all rent and charges, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years, and having a beneficial interest therein of the clear yearly value of not less than ten pounds over and above all rent and charges, shall be entitled to vote in the election of a knight or knights of the shire for the county in which such lands or tenements shall respectively be situate: provided always, that no person, being such lessee or assignee of such term of twenty years, and no person, being only a sub-lessee, or the assignee of any underlease, shall have a right to vote in respect of any such term of sixty years, or fourteen or twenty years, as aforesaid, unless he shall be in the actual occupation of the premises; and provided also, that any renewal or new lease of the same premises, for the same rent and for a term not less than such original term, shall for the purposes of this act be deemed to be a continuance of the same qualification as aforesaid.

II. And be it enacted, that every male person of full age, and not subject to any legal incapacity, who shall be seized at law or in equity of any lands or tenements of copyhold tenure, for his life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than ten pounds over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county in which such lands or tenements shall be respectively situate.

III. Nothing in this act contained shall take away or in any manner affect the rights of voting for knights of the shire at present enjoyed by or which may hereafter accrue to any person by virtue of any law now in force, except so far as herein specially provided.

IV. Notwithstanding any thing herein contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest in any house, warehouse, counting-house, or shop occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, or shop, such house, warehouse, counting-house, or shop being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city, town, or borough,

whether he shall or shall not have actually acquired the right to vote for such city, town, or borough in respect thereof.

V. In every city or town, being a county of a city or county of a town by itself, and which shall return a member or members to serve in any future parliament, in addition to the persons now by law qualified to vote at the election of such member or members, every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any freehold estate in any lands or tenements within such city or town, and shall be in the actual occupation thereof, and who shall have a beneficial interest therein of the clear yearly value of ten pounds at the least above all rent and charges payable out of the same, or who shall hold as lessee or assignee any lands or tenements within such city or town, for such term, of such value, and subject to such provisions as would under this act, if such lands or tenements were situate in a county at large without the limits of such city or town, entitle such person to register his vote for such county, or who shall hold and occupy within such city or town, as tenant or owner, any house, warehouse, counting-house, or shop, which, either separately, or jointly with any land within such city or town occupied therewith by him as tenant under the same landlord, or occupied therewith by him as owner, shall be *bona fide* of the clear yearly value of not less than ten pounds, shall, if duly registered according to the provisions of this act, be entitled to vote in the election of a member or members to serve, in any future parliament for such city or town: provided always, that no such occupier as last above mentioned shall be admitted to be registered under this act, unless he shall have occupied such premises as aforesaid for six calendar months next previous to the time of his registry, nor unless such occupier shall have paid or discharged all such grand jury and municipal cesses, rates, and taxes, if any, as shall have become legally due and payable by him in respect of such premises, over and above and except one half year's amount of such cesses, rates, and taxes aforesaid.

VI. From and after the commencement of this act no person, save as herein is provided, shall be registered or admitted to vote as a freeholder at any election of any member or members to serve in any future parliament for any county of a city or county of a town in Ireland, unless such person shall have an estate of freehold in lands, tenements, or hereditaments, in such county of a city or county of a town, of the clear yearly value of ten pounds at the least above all charges, any law or statute to the contrary notwithstanding: provided always, that nothing in this act contained shall prevent any person now being a forty-shilling freeholder entitled to register as such from retaining (so long as he shall continue to be seised of the same lands or tenements) the right of voting in such election in respect thereof, if duly registered according to the provisions of this act.

VII. At all elections of a member or members to serve in any future parliament for any city, town, or borough in Ireland, not being a county in itself, every male person of full age, and not subject to any legal incapacity, and duly registered according to the provisions of this act, who shall hold and occupy within such city, town, or borough, as tenant or owner, any house, warehouse, counting-house, or shop, which, either separately, or jointly with any land within such city, town, or borough occupied therewith by him as tenant under the same landlord, or occupied therewith by him as owner, shall be *bona fide* of the clear yearly value of not less than ten pounds, shall be entitled to vote in the choice of a member or members to serve in any future parliament for such city, &c.: provided always, that no such occupier as last aforesaid shall be admitted to be registered under this act, unless he shall have occupied such premises as aforesaid for six calendar months next previous to the time of registry, nor unless such occupier shall have paid or discharged all such grand jury and municipal cesses, rates, and taxes, if any, as shall have become legally due and payable by him in respect of such premises, over and above and except one half year's amount of such cesses, rates, and taxes aforesaid.

VIII. Provided nevertheless, that notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of a member or members to serve in any future parliament, for any city or town, or county of a city or town, in respect of any estate or interest in any freehold under the yearly value of ten pounds, which shall have been acquired by such person since the first day of March, 1831, unless the same shall have come to or been acquired by such person since that day, and previously to the passing of this act,

by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office.

IX. Provided always, that all freemen, freeholders, and persons who by reason of any corporate or other right are now by law entitled to vote at the election of a member or members to serve in parliament for any city, town, or borough, and all persons who, by reason of birth, marriage, or service, or of any statute now in force, shall be at any time hereafter admitted to their freedom in any city, town, or borough sending a member or members to parliament, shall, after such registration as is directed by this act, but so long only as they shall reside within the said city, town, or borough, or within seven statute miles of the usual place of election therein, have and enjoy such right of voting as fully and in like manner as if this act had not been passed: provided further, that no persons who since the thirtieth day of March in the year 1831, have been or hereafter shall be admitted as honorary freemen shall be entitled, by virtue of such admission, to vote or register as freemen under this act.

X. No public or parliamentary tax, county, church, or parish cess or rate, or any cess or rate upon any townland, or division of any parish, barony, or half barony, shall be deemed a charge payable out of any estate or tenement within the meaning of this act.

XI. The city of Limerick, the city of Waterford, the borough of Belfast, the county of the town of Galway, and the university of Dublin, shall each respectively return one member to serve in each future parliament, in addition to the member which each of the said places is now by law entitled to return.

XII. Each of the cities, towns, and boroughs returning a member or members to serve in parliament, shall, for the purposes of this act, include the place or places respectively which shall be comprehended within the boundaries of each of the said cities, towns, and boroughs respectively, as such boundaries shall be settled by an act to be passed for that purpose in this present parliament, which act, when passed, shall be deemed and taken to be part of this act as fully and effectually as if the same were incorporated herewith: provided always, that until the passing of said last mentioned act all such cities, towns, and boroughs shall, for the purposes of this act, be deemed and taken to be comprehended within the same limits and boundaries as before the passing of this act.

XIII. No person shall be admitted to vote at any election of a member or members to serve in any future parliament for any county, city, town, or borough in Ireland, the university of Dublin excepted, unless such person shall have been qualified as aforesaid, and duly registered under this act; and no person shall be so registered in respect of any lands, tenements, or hereditaments, unless he shall have been in the actual possession thereof, or in receipt of the rents, issues, or profits thereof, for his own use, as the case may require, for six calendar months next previous to his registry under this act: provided always, that when any lands, tenements, or hereditaments, which would otherwise entitle the owner, holder, or possessor thereof to vote in any such election, shall come to any person, at any time within six months next before such registry, by descent, succession, marriage settlement, devise, or promotion to any benefice or office, such person shall be entitled, in respect thereof, to be registered as a voter at the registry for such county, city, town, and borough respectively then next to be had by virtue of this act.

XIV. And further, after the commencement of this act a special session, for the purpose of registering votes for each county, city, town, and borough in Ireland having the right to send a member or members to parliament (the borough of the university of Dublin only excepted), shall be holden in each such county by and before the assistant barrister or chairman of such county, and in each such city, town, and borough respectively by and before the assistant barristers in the schedule A hereunto annexed mentioned, on such day or days and at such places respectively as the lord lieutenant or other chief governor of Ireland shall appoint; and the clerk of the peace in and for each such county, city, town, and borough, or his deputy, shall, thirty days at the least before the day respectively so appointed, cause to be posted, in conspicuous places within each such county, &c. respectively, notices that such session for the purposes of registering the names of voters under this act for such county, &c., will be held on the days and at the places so appointed, and that applications for that purpose will be then and there taken into consideration.



XV. Every person intending to apply at such session to be registered as a voter for any county, city, town, or borough, shall, twenty clear days at the least before the first day appointed for holding such sessions respectively, give or cause to be given a notice in writing of such his intention to the clerk of the peace, or his deputy, acting for such county, &c., or to the high constable of the barony within which the property to be registered is situate; and the high constable shall, without delay, transmit all notices so given to him to the clerk of the peace; and such person so intending to register shall, in such notice, state his name and residence, the right in respect of which he intends to apply, and the nature of the qualification relied upon by him as entitling him to be so registered; and such clerk of the peace, or his deputy, shall thereupon enter all such notices according to the order in which he shall receive them, and shall, ten days at least before the day appointed for holding such session, cause alphabetical lists of such voters to be printed and circulated, and to be posted in conspicuous places throughout such county, &c.; and no such list shall be liable to any stamp duty.

XVI. At such special session the clerk of the peace, or his deputy, shall call the names of the persons contained in such list in alphabetical order, and shall again, twice at the least during such sessions, call over the names of all such persons as did not appear upon such first calling, and that each claimant's case shall be heard in the order of his appearance; and each person so called shall produce in open court the deed, lease, or instrument, if any, duly stamped, by virtue of which he shall claim a right to be registered, or shall, by his own oath, or otherwise, as the assistant barrister shall require, sufficiently account for the non-production thereof; or if he shall not claim by virtue of a deed, lease, or instrument, or is disabled from producing such deed, &c., then such person shall otherwise establish his right to be registered as such voter, pursuant to his said notice, according to the provisions of this act; and such person, if claiming as a freeholder, or leaseholder, or householder, shall also make it appear that the property in respect of which he seeks to be so registered is of the value and nature by this act prescribed, and that he is otherwise duly qualified to be registered, according to the provisions of this act: provided always, that no person shall be bound to produce the title deeds of any landlord under whom he may hold or derive, or make proof of such title, and that possession and perception of rent shall be deemed *prima facie* evidence of such landlord's title.

XVII. The assistant barrister or chairman shall inspect and examine every deed, lease, or instrument so produced, and shall investigate the claim made thereunder, or otherwise, to be registered, and shall determine upon the validity or invalidity of such claim, and shall and may examine and inquire, as well by the oaths of the claimants as by any other evidence offered in support of or in opposition to such claim, whether such claimant is or is not to be registered as a voter for the county, &c. to which his claim shall relate, and in case of any claim in respect of the freehold, leasehold, or household property, whether the same be of the value and nature respectively hereby prescribed and required, and shall also inquire, by any of the means aforesaid, as he shall think fit, into the truth of the several particulars required by the provisions of this act, or required to be stated in any oath by such claimant hereinafter prescribed to be taken for such registry.

XVIII. Provided always, that no person shall be received as the opposer of any claimant to register at such sessions who shall not be himself either a registered voter for such county, city, town, or borough, or a person who has served a notice to register as a voter at the same sessions, or some counsel, attorney, or agent duly authorized by such voter or claimant to appear for him or on his behalf.

XIX. If such assistant barrister or chairman shall deem such claimant to be entitled under this act, to be registered as a voter for the county, city, town, or borough to which his claim shall relate, and not be subject to any legal disqualification, such barrister or chairman shall so declare and adjudge; and the person so declared entitled shall verify his title by affidavit, and shall take and subscribe (as the case may be) the oath stated in the schedule C instead of any oath or oaths which by the law now in being he would be liable to take or subscribe.

XX. Every such affidavit shall be signed by the barrister or chairman before whom the same shall be taken, and shall be by him delivered to the clerk of the peace, or his deputy,

as the case may be, to be filed and kept amongst the records of the county, city, town, or borough; and such barrister is hereby required to take care that such oaths shall be agreeable to the form hereby prescribed, or as near thereto as may be; and no objection, in point of form, shall at any time hereafter be allowed to any such oath, when signed.

XXI. In case it shall appear to such barrister or chairman that any person claiming to be registered as a voter for any county, city, town, or borough is not entitled so to be registered, such barrister or chairman shall refuse to permit such person to be registered, and shall make an order accordingly; and when such refusal shall be on the ground of insufficiency of value, the order of refusal shall state such insufficiency as the ground of such order, or otherwise shall state the objection by reason whereof the claimant has been adjudged not to be entitled to be registered: provided always, that such order shall be without prejudice to any future application to be registered, which the person so rejected shall think fit to make at any subsequent general quarter sessions of the peace.

XXII. Provided always, that a certificate of registry made pursuant to the laws in force in Ireland, previous to the passing of this act, shall be deemed and taken to be *prima facie* evidence of the right to be registered; and that any person, having given notice of his intention to register as by this act required, shall, upon producing or causing to be produced such certificate at the session for that purpose to be held, be entitled and admitted to register his vote and obtain his certificate under this act, without further proof or oath, unless cause to the contrary shall appear, and without any fee or charge; and in cases where a certificate of registry shall not be produced, or in case it shall appear expedient, it shall be lawful for the assistant barrister or chairman presiding at the sessions to be holden for the purpose of registering votes under this act to refer to any original affidavit or affirmation, or transcript or record thereof, or any entry thereof in the book or books, which, by virtue of the laws now in force in Ireland, the clerks of the peace or town clerks throughout Ireland are authorized or required to make or keep; and in case the said assistant barrister or chairman shall be satisfied, on inspection thereof, that such affirmations or affidavits or entries are correct, it shall not be necessary for him further to inquire into the right of voting claimed thereunder, but he shall and may direct and allow the same to be registered, and the claimant to have his certificate under this act, without oath or further proof, unless cause to the contrary shall appear, and without any fee or charge.

XXIII. Provided always, that all forty shilling freeholders and five pound householders claiming a right to be registered under this act shall appear in person before the assistant barrister at the sessions, to be examined on oath by such barrister touching such their claim to be registered, and they shall, if required by such barrister, make proof of the nature and sufficiency of their qualification to be so registered, and shall upon such proof being made, and also proof of identity, be admitted or rejected accordingly.

XXIV. If any person against whose claim any such order shall be made on the ground of insufficiency of value shall deem himself aggrieved thereby, it shall be lawful for such person to appeal therefrom to the judges of assize at the next assizes for the county, city, town, or place within which the property in right whereof such person claims to register such vote shall be situate; and such judges of assize, or one of them, are and is hereby empowered and required to try and inquire by the verdict of a jury whether such property is of the annual value within the meaning of this act at which the claimant seeks to register such vote; and such jury shall be returned by the same officer and in the same manner in which juries are now returned in cases of appeal from the decrees of assistant barristers on civil bills; and if such jury shall give a verdict in favour of the claim to register, and the judge before whom the same shall be tried shall consider such claim to be in other respects well founded, the order so complained of shall be thereupon reversed, and the claimant be declared and adjudged entitled to be registered as a voter under this act; and such adjudication shall have the same effect to all intents and purposes as if the same had been made by such assistant barrister or chairman at the sessions aforesaid.

XXV. Where any person, against whose claim to register as a voter at elections for any county, city, or town or place, any order shall be made by the assistant barrister or chairman on any other ground than insufficiency of value, shall consider himself aggrieved by such order, it shall be lawful for such person to appeal from such order to the judges of as-

size at the next assizes to be holden for the same county, city, town, or place; and such judges of assize, or one of them, shall have power, on motion, to review such order, and either to affirm or reverse the same, as shall be fit, and thereupon to adjudicate; and which adjudication shall have the same effect, to all intents and purposes, as if it had been made by such assistant barrister or chairman at the sessions aforesaid.

XXVI. In every case in which an order of an assistant barrister or chairman shall upon appeal be reversed, the judge before whom the same shall have been heard shall thereupon cause such oath to be taken and subscribed, and such certificate to be given, and shall sign the same respectively, in like manner as the assistant barrister is hereinbefore required to do, and shall cause such acts to be performed by the clerk of the peace or his deputy, and such proceedings to be had, as hereinbefore directed and required when any voter is registered at any sessions before the assistant barrister or chairman; and such oath and certificate, and such acts and proceedings, shall be of the like effect as if they had been taken, subscribed, given, performed, and had before the assistant barrister or chairman.

XXVII. After the determination of the session hereby directed to be first holden for the registry of voters for counties, cities, towns, and boroughs, it shall be lawful for any person claiming a right so to be registered to apply for that purpose at any sessions of the peace or adjournment thereof to be held by and before the assistant barrister or chairman of the proper county, and by and before the assistant barrister or chairman by the said schedule A authorized to register voters for such city, &c., upon giving to the clerk of the peace a notice of his intention so to do, in the form herein provided, twenty clear days at the least before the day appointed for the holding of such general or quarter session, and if within a county at large, in the division within which the freehold or leasehold interest intended to be registered shall be situate; and the clerk of the peace or his deputy shall in such case proceed in all respects in the same manner as hereinbefore prescribed with relation to applications for registering voters at the first session for that purpose, hereby directed; and the assistant barrister of such county, or chairman, is hereby authorized and required to hear and determine such applications at such general or quarter sessions, and at the commencement of such sessions, and before any other business, civil or criminal, in the same manner in all respects as is hereinbefore provided with respect to applications to register at the sessions for that purpose to be first holden under this act; and thereupon the same proceedings shall and may be had, the like orders made, the like oaths taken, the like certificates granted, the like rights and powers of appeal enjoyed and exercised, and the like rules and regulations, enactments and things, observed, performed, and followed, as if such application had been made at the first session for registering voters directed to be held under this act: provided always, that a certificate of a former registry under this act shall be deemed and taken to be *prima facie* evidence of the right of voting; and that any person, having given notice of his intention to register anew under this act, shall, upon producing or causing to be produced such former certificate at the sessions for that purpose to be held, be entitled and admitted to register his vote, and to obtain a new certificate under this act, without further proof or oath, unless cause to the contrary shall appear, and shall by virtue of such new certificate be entitled to vote at any election or elections to be held within eight years next after the obtaining of such new certificate.

XXVIII. Upon any person being under this act declared entitled to be registered as a voter, the clerk of the peace or his deputy shall, upon payment to him of the sum of one shilling, give to the person so declared entitled a certificate on parchment, signed by such clerk of the peace or his deputy, as also by the barrister, chairman, or judge, declaring such right, that such person has been registered as a voter for such county, city, town, or borough, and the character and right in which he has been so registered, and the date of such registry as aforesaid, and shall then and there make an entry of such certificate at the foot of the voter's affidavit of registry, and sign his name to such entry; and which certificate shall be the proper evidence of the right of the person named therein to vote: provided always, that in the absence of such certificate, the voter shall be entitled to refer to his original affidavit of registry, with the entry thereon, in the hands of the deputy clerk of the peace, and which original affidavit such deputy is required immediately to produce to the returning officer or his deputy.

XXIX. Every person who shall duly register as a voter within this act at the first session for registering his vote within this act shall be thereupon forthwith entitled to vote at any election to be held in and for the county, city, town, or borough for which such voter shall be registered; and that any person who shall at any time after such first session duly register his vote according to the provisions of this act shall be entitled to vote at any election to be held by virtue of any writ tested six calendar months at least after such registry.

XXX. And further, that the clerk of the peace, at every election of a member to serve in parliament for any county, city, town, or borough, shall appoint, or in failure thereof the returning officer or officers shall appoint, a deputy clerk of the peace, and likewise an assistant to such deputy, to be present in each booth or place of polling, who shall take with him into such place of polling all the original affidavits and affirmations which have been made by the persons capable of voting in such place of polling respectively, any act to the contrary notwithstanding; which affidavits or affirmations the clerk of the peace is hereby required to have arranged alphabetically in separate parcels, (one or more for each letter of the alphabet,) and indorsed with the names of the persons by whom the same were respectively made, and also with the number of the entry of affidavit or affirmation in the registry book; and that in those cases wherein a certificate of registry shall not be produced by the person tendering his vote or offering to poll, such deputy shall, on the demand of the person offering to poll, produce the original affidavit or affirmation of the registry of such person; and that such deputy clerk of the peace shall be entitled to receive the sum of ten shillings, and no more, for each day of his attendance, any act to the contrary notwithstanding; and such assistant to such deputy shall be entitled to receive the sum of five shillings for each day of his attendance; and that if such deputy, or such assistant to such deputy, shall alter, deface, destroy, or lose any affidavit or affirmation of registry committed to his care, he shall forfeit the sum of ten pounds for every such offence to any person suing for the same, by action of debt, at any general quarter sessions of the peace.

XXXI. No person shall be admitted to vote at any election of a member or members to serve in any future parliament, by virtue of any registry under this act, unless he shall have registered within eight years next before such election.

XXXII. No registry hereafter to be made shall be valid unless made conformably to the provisions of this act.

XXXIII. In case any exigency shall render it necessary for any assistant barrister or chairman to adjourn any session for the registry of votes so appointed to be holden, or in case he shall be so directed by the lord lieutenant, it shall be lawful for him to adjourn and continue the same, as circumstances may require, either to the same place, or to such other place or places as the lord lieutenant shall direct.

XXXIV. Any person registering under this act shall be exempted from the payment of any fee whatever for filing the certificate or other duty in respect of such registry, save only such fee of one shilling to the clerk of the peace as by this act is provided.

XXXV. And further, that the clerk of the peace for each county, city, town, and borough returning a member or members to parliament shall, under the direction and with the advice of the chairman or barrister, as the case may be, on or before the first day of February in each and every year, examine, correct, and make out complete alphabetical lists of the registered voters in each county, &c., in which he has acted in making such registry as aforesaid, with the dates of their registries respectively annexed, and shall, at the expense of such county, &c., respectively, on or before the said first day of February in each year, cause such lists to be printed, and posted in some conspicuous places in the counties, cities, towns, and boroughs to which such lists respectively relate, and shall also deliver to any person applying for the same a copy of each such printed list, upon being paid one shilling for each such copy.

XXXVI. The expenses of printing the notices and postings hereby directed shall be defrayed by the clerk of the peace in such county, city, and town respectively; and the grand jury of each such county, &c., as the case may be, are hereby required, at the next assizes or presenting term after such notices and postings, to present to be levied off their respective counties in the same manner as other sums are authorized to be presented by such grand

juries, all such sums as shall have been necessarily disbursed by such clerks of the peace respectively, which sums shall be paid to such clerks of the peace.

XXXVII. No barrister or chairman shall be eligible to serve in parliament for any county, city, town, or borough sending a member or members to parliament, in which he shall have exercised jurisdiction under this act as such barrister or chairman, for seven years after he shall have exercised such jurisdiction.

XXXVIII. Each riding in the county of Cork shall be deemed to be a county for the purpose of registry under this act.

XXXIX. If any person shall refuse to be sworn or to give evidence before any judge, barrister, chairman, or jury, upon the investigation of any claim to register under this act as aforesaid, without sufficient lawful excuse to be allowed by such judge, &c., it shall be lawful for such judge, &c., to order such person to pay a fine not exceeding ten pounds, to be applied to the use of the infirmary of the county, city, or town respectively, or such charitable institution as the judge, chairman, or barrister shall think fit, or in default thereof to commit such person to the goal of the said county, city, or town respectively for any term not exceeding two calendar months.

XL. If any person shall forge or counterfeit the signature of any judge, chairman, barrister, or clerk of the peace to any order, certificate, or instrument in writing purporting to be an order or certificate within this act, or the signature of any person to any oath or affirmation within this act, or shall knowingly utter or publish as true and genuine any such forged or counterfeited order, certificate, instrument, writing, oath, or affirmation, every person so offending shall be deemed guilty of felony, and shall be liable, at the discretion of the court before which he shall be tried, to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

XLI. In every case where an oath is by this act, required to be taken, every person, being a Moravian or Quaker, may make affirmation in the form prescribed hereby for each such oath respectively, and that all provisions herein contained relative to any oath shall respectively extend and apply to every such affirmation.

XLII. If any person shall, in any oath or affirmation to be taken under this act, wilfully and corruptly swear or affirm falsely, such person shall be deemed guilty of perjury, and be liable to the same pains, penalties, and punishments as any person is now liable to for wilful and corrupt perjury.

XLIII. The sheriff of each county, city, and town in Ireland, or his under sheriff, and also the clerk of the peace or his deputy, and town clerks, for each such county, &c., or his deputy, and the high constable of the barony in which each and every such court of sessions as by this act is directed shall be held, and such number of other constables as the assistant barrister or chairman shall deem sufficient, shall attend the court from day to day during the continuance of such sessions; and every clerk of the peace and town clerk, or deputy, as the case may be, attending any such sessions, shall take with him and from day to day attend with such original affidavits or affirmations, and all and every such book and registry, as under and by virtue of the laws now in force in Ireland, or under this act, such clerk of the peace or town clerk, or his deputy, is required to keep or to attend with and produce at any election or place of polling in Ireland.

XLIV. In the county of Dublin all voters to be registered under this act shall be registered before the chairman of the sessions of that county, and in the city of Dublin before the said chairman, who shall for such purpose hold a session four times in each year, at such times and places as the lord lieutenant or other chief governor or governors of Ireland shall appoint, and that such registry shall be conducted in the same manner in all respects as before the assistant barrister in any other county, city, or town; and such chairman shall have, exercise, perform, and discharge every power, jurisdiction, right, authority, duty, and function hereby vested in or given to any such assistant barrister; and in any case where an appeal is hereby allowed from the order of an assistant barrister to the judge of assize the like power of appeal from any order of such chairman shall and may, in the case of any voter in the county of Dublin and city of Dublin respectively, be enjoyed and had to a judge of any of his majesty's superior law courts of record in Dublin *ad nisi prius*, at the sittings

for the city of Dublin next after such order made, and the judge to which any such appeal shall be made shall proceed with respect thereto in the same manner as any judge of assize is hereby authorized or required to proceed.

XLV. Every session to be held for registering voters within this act shall be deemed a court of record; and that it shall be lawful for every barrister or chairman before whom such court shall be held, from time to time as there shall be occasion, to fine the clerk of the peace or his deputy, the town clerk or his deputy, or the sub-sheriff of the county, city, or town for which the said court shall be held, and any high or other constable, who shall respectively be guilty of any breach of duty in the execution of this act, in any sum not exceeding five pounds, and, at his discretion, to fine in any sum not exceeding forty shillings, or to commit to prison for any time not exceeding a fortnight, any person whatsoever who shall disturb the court so to be held by him for registering voters as aforesaid, or who shall be guilty of any other contempt of the said court.

XLVI. Provided always, that it shall be lawful for any freeholder who may be entitled by law to register a freehold in any county, county of a city, or county of a town in Ireland, of the annual value of not less than fifty pounds, and for every clergyman who claims to vote as a freeholder in right of his benefice, to register such freehold either at the special or any general quarter sessions to be holden under this act, or to register such freehold by taking and subscribing the proper oath by the annexed schedule prescribed, in any of the superior courts of record in Dublin, or before a judge at the assizes, in the manner now by law authorized; and the said oath shall be subscribed by one of the judges of the court before whom the same was taken, and being delivered to the clerk of the peace, shall be signed by him, and kept amongst the records of the proper county; and each such freeholder shall be thereupon entitled, upon payment of the fee of one shilling, to receive, at any quarter sessions of the peace for the division of the county in which his freehold shall be situate, a certificate of his registry as a voter for such county, &c., respectively; which certificate shall be in the form by this act prescribed, and shall be signed by the assistant barrister and clerk of the peace, or his deputy, and shall be of equal validity with any certificate to be granted under this act, and subject to the same provisions.

XLVII. No person shall be allowed to have any vote at any election of a member or members to serve in parliament for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual receipt of the rents and profits of the same estate, but that the cestuique trust or mortgagor in possession shall and may register and vote for the same estate, notwithstanding such trust or mortgage.

XLVIII. After the end of the present parliament all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates, and the same shall be erected by contract with the candidates if they shall think fit to make such contract, or if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer or officers, at the expense of the several candidates as aforesaid; and the deputies appointed by the said sheriff or other returning officer or officers shall be paid each two guineas by the day, and the clerks employed in taking the polls shall be paid each one guinea by the day, at the expense of the candidates at such election: provided always, that if any person shall be proposed without his consent, then that the person so proposing him shall deposit or give security in a sufficient sum to defray his share of the said expenses in like manner as if he had been a candidate.

XLIX. The sheriff or other returning officer shall, before the day fixed for the election, cause to be made, for the use of each booth at such election, a true copy of the register of voters, and shall under his hand certify every such copy to be true.

L. Every deputy of a sheriff or other returning officer shall have the same power of administering the oaths and affirmations required by law as the sheriff or other returning officer has by virtue of this or any other act, and subject to the same regulations and provisions in every respect as such sheriff or other returning officer; and that such oaths shall be agreeable to the forms by law required, or as near thereto as may be.

LI. And further, whenever, in any one barony or half barony of the county, or in any county of a city or county of a town, or in any borough, the number of registered voters appearing by the books of the clerk of the peace capable of voting at any election for the same

shall exceed six hundred voters, it shall and may be lawful for the returning officer or officers, and he and they are hereby required, to provide two or more polling places for such barony or half barony, or for such county of a city or county of a town, or borough, and to make such a division or divisions of the voters, according to the first letters of their names, that it shall not be necessary for more than six hundred voters to poll in any one place of polling, but so as not to divide the names beginning with the same letter of the alphabet; and that it shall and may be lawful for the returning officer or officers, and he and they are hereby required, to provide as many new places of polling as may be necessary for the purpose, and to appoint as many additional deputies and poll clerks as shall be necessary to take the poll in such additional places of polling, not exceeding one deputy and one poll clerk for each such place of polling; and provided always, that in case the number of voters in any two or more baronies or half baronies in any county shall not exceed the number of six hundred voters, it shall be lawful for the returning officer or officers, and he and they are hereby required, to provide that the poll for such baronies and half baronies shall be taken in one place of polling only.

LII. And further, that from and after the passing of this act every poll which shall be demanded at any election of a member or members to serve in parliament for any county, city, town, or borough in Ireland shall commence on the day upon which the same shall be demanded, or upon the next day after (unless such day shall happen to be a Sunday, Christmas day, or Good Friday, and in such case on the day next after), and shall be duly and regularly proceeded in from day to day for so many hours of each polling day as the returning officer or officers are now by law directed to keep the poll open in counties at large (Sunday, Christmas day, and Good Friday excepted), until the same shall be finished, but so that no poll shall continue more than five days at the most (Sunday, Christmas day, and Good Friday always excepted); and if such poll shall continue until the fifth day, then the same shall be finally closed at or before the hour of five o'clock in the afternoon of the same day; and the returning officer shall immediately after the final close of the poll declare the name or names of the person or persons having the majority of votes in such poll, and shall forthwith make a return of such person or persons.

LIII. Provided always that it shall and may be lawful for the returning officer at any such election, and he is hereby required, on any day during such election after the first day of polling, to close finally the poll in any booth or place of polling in which no more than twenty persons have polled during that day: provided always, that in case it shall appear to the returning officer, upon the evidence of two or more credible persons, taken upon oath, and which oath the returning officer is hereby empowered to administer, that any persons intending to offer themselves to poll in such booth or place of polling have been prevented by force or violence from coming to the same for the purpose of polling on that day, that then and in such case it shall be lawful to and for the returning officer to keep such booth or place of polling open for another day, and so on from day to day, if such force or violence be repeated, and be found to have taken place upon such evidence as aforesaid, to the satisfaction of the returning officer, and for such purpose to delay the final close of the poll and the return so long as may be necessary.

LIV. The certificate by this act directed, or in default of its production the original affidavit of registry, shall be conclusive of the right of voting of the person named therein; and that the returning officer or his deputy, upon the production of such certificate or affidavit by such person, and upon his taking the oaths hereinafter mentioned, if required so to do, shall admit such person to vote without any other oath or examination, and shall indorse the initials of his name thereon, with the day and year when the same was produced; and that no inquiry whatever as to the right of voting of such persons shall be permitted to be made, nor shall any scrutiny be allowed; save only that the sheriff, returning officer, or his deputy, shall, if required by any candidate or his agent, and he is hereby authorized so to do, immediately before the polling of any voter, administer to such voter the oath in the schedule B to this act annexed; and provided also, that the oath against bribery may be administered, at the desire of any candidate, to any person tendering his vote, in like manner as the same might be administered before the passing of this act; and provided always, that if such person so tendering his vote shall appear by such certificate to have before voted

at such election, or shall refuse to take the said oaths or either of them when required so to do, the sheriff, returning officer, or his deputy shall reject such vote.

LIV. All laws, statutes, and usages now in force respecting elections of members to serve in parliament for any county, city, town, or borough in Ireland shall, save so far as they are respectively repealed or altered by this act, remain and they are hereby re-enacted and declared to be in full force; and all elections for any member or members to serve in this present parliament, to be hereafter had, shall be held and made as if this act had not been passed.

LVI. Provided always, that if a dissolution of this present parliament shall take place after the passing of this act, and before the termination of the special sessions for any county, city, or town, to be first holden under the provisions of this act, in such case such persons only shall be entitled to vote at the election of members to serve in a new parliament for such county, city, or town, as would have been entitled to register their votes under this act, if the day of election had been the day for such registry, and such persons shall be entitled to vote in such election although they may not be registered according to the provision of this act, any thing herein contained notwithstanding.

LVII. If any sheriff, clerk of the peace, town clerk, returning officer, or other person shall wilfully contravene or disobey any provisions of this act, he shall for each such offence be liable to be sued for the sum of one hundred pounds, to be recovered by action of debt or information, in the name of his majesty's attorney general or any other person, in any of his majesty's superior courts of record at Dublin; and the jury may in any such action find a verdict for the sum of one hundred pounds, or for any sum not less than ten pounds, as they shall think just; and the defendant against whom such verdict shall be found shall pay the amount thereof, with full costs of suit, to the use of his majesty or of the person suing.

LVIII. Nothing herein contained shall in anywise prejudice or affect the right of any party grieved by any such misconduct of any sheriff, returning officer, or other person, to recover in an action on the case for a false return, or such other action as such person may by law be then entitled to maintain.

LIX. If any person, at the time of any election being in the enjoyment of any office disqualifying him from voting at such election, or being otherwise disqualified, or having ceased to be qualified, shall notwithstanding presume to vote at such election, such person shall forfeit to his majesty a sum of one hundred pounds, and shall be liable to all penalties, forfeitures, and provisions to which he would have been subject for such offence by any law in force at the time of committing the same; and in case of a petition to the house of commons for altering the return, or setting aside the election at which such person shall have voted, his vote shall be struck off by the committee, with such costs as to them shall seem meet, to be paid by him to the petitioner.

LX. In addition to the persons now qualified to vote at the election of a member to serve in parliament for the university of Dublin, every person, being of the age of twenty-one years, who has obtained or hereafter shall obtain the degree of master of arts, or any higher degree, or a scholarship or fellowship in the said university, and whose name shall be upon the books of the said university, shall be entitled to vote at any election of a member or members to serve in any future parliament for the said university, so long as the name of such person shall be kept and continue to be kept on the books of the said university as a member thereof, subject however, and according to the rules and statutes of the said university: provided always, that no person shall be entitled to vote at any election of a member or members to serve in any future parliament for the said university by reason of any degree of a purely honorary nature.

LXI. Every person who now is a master or bachelor of arts, or of any higher degree, or who has been a scholar or fellow of the said university, and who shall have voluntarily removed his name from the books of the said university, shall be entitled, within six months after the passing of this act, and not after, to replace the same thereon, upon payment of the sum of two pounds; and every person whose name shall be continued upon the said books, for the purpose of entitling him to vote at the election of members to serve in parliament for the said university, shall be liable to pay to the said college an annual sum of one pound, and no more; and that upon the refusal of any such person to pay the annual sum



of one pound, within one month after the same shall have been demanded, his name shall be removed from said books, and shall not be again replaced thereon.

LXII. The words "city, town, or borough," used in this act, shall be construed to include all places, whether corporate or otherwise, entitled to send a member or members to parliament; and the words "returning officer," used in this act, shall be construed to include every person by his office entitled to preside at the election of a member or members to serve in parliament, and to include several persons so entitled.

LXIII. No clergyman shall be permitted to vote as such at any election of a member or members to serve in any future parliament, unless his name shall have been duly registered as a freeholder under this act.

LXIV. And be it declared and enacted, that every person entitled to two or more freehold estates or interests in any county, county of a city, or county of a town in Ireland, the annual value whereof shall in the aggregate amount to ten pounds, according to the mode of valuing freeholds by this act prescribed for the qualification of electors, and who shall in all other respects be duly qualified, shall be admitted to register and vote according to the provisions of this act, as if said separate freehold were one freehold, although no one of such freehold estates may be of such annual value of ten pounds, according to such mode of valuation.

LXV. And whereas by an act passed in the first year of his late majesty's reign,\* intituled "An act for the better regulation of polls, and for making further provision touching the election of members to serve in parliament for Ireland," it is enacted, that if any person shall vote at any election by virtue of the registry of an alleged freehold under a lease of lands and tenements for a life or lives made by the lessor, who had not at the time of making the same a freehold estate therein, or under a lease of lands or tenements for a life or lives, which lease is to end and determine on some such covenant or condition that a freehold estate has not been demise by the same, or under a lease of lands or tenements for a life or lives, or a certain number of years, which life or lives is or are dead, or under a lease of lands or tenements for a life or lives, which lease has expired or been surrendered, after due notice not to vote by virtue of any such registry shall have been given to such person by any candidate, or by any inspector of any candidate, and which notice every candidate and inspector is thereby authorized and empowered to give such person at any time before or during such election, or in the place of polling, such person, on being convicted thereof, shall forfeit to any person who shall sue for the sum of twenty pounds, to be recovered by him or them, with treble costs of suit, by action of debt, at any general quarter sessions of the peace, or at any assizes that may be held for the county in which such election shall have taken place: and whereas by an act passed in the fourth year of his late majesty's reign,† intituled "An act to consolidate and amend the several acts then in force, so far as the same relate to the election and return of members to serve in parliament for counties of cities and counties of towns in Ireland," a similar provision is made with reference to such counties of cities and counties of towns: and whereas the giving of such cautionary notices by candidates and inspectors, at and during the time of an election, and in the place of polling, has been productive in many cases of vexatious delays and inconvenience to voters, and is inexpedient and unnecessary; be it therefore enacted, that from and after the passing of this act so much of the said recited acts of the first and of the fourth year of his late majesty's reign as authorizes and empowers every candidate and inspector to give such cautionary notices to voters at any time before or during the elections in Ireland, or in the place of polling at such elections, and as renders it necessary that such notices shall have been so given to any person voting by virtue of the registry of the said therein recited alleged freeholds, in order to such person being or becoming subject to and incurring the penalties thereby imposed, shall be and are hereby repealed: provided always, that nothing herein contained shall exempt or be construed to exempt from such penalties any person who at the election of any member or members to serve in parliament for any county, or county of a city, or county of a town in Ireland, shall vote by virtue of the registry of such alleged freehold as aforesaid; but such person, on being convicted thereof, notwithstanding the want of such notice by any

\* 1 Geo. IV., c. 11

† 4 Geo. IV. c. 55.

candidate or inspector, shall forfeit to any person or persons who shall sue for the same the said sum of twenty pounds, to be recovered by him or them, with treble costs of suit, by proceeding in the nature of civil bill, at any general quarter sessions of the peace that may be held for the county, or county of the city, or county of the town in which such election shall have taken place, or by action of debt in any of his majesty's courts of record in Ireland.

LXVI. The lord lieutenant or other chief governor or governors of Ireland shall be and are hereby authorized, by warrant under his or their hand, to appoint, for the duty of presiding at the special sessions to be first held for registering voters under this act, in any county, city, town, or borough, or in any two or more of such counties, cities, towns, or boroughs, any barrister or barristers of not less than six years' standing at the Irish bar to be assistant to or deputies of the assistant barrister or chairman; and when two or more barristers shall be appointed for the same county, riding, city, town, or borough, they shall attend at the same place together, but shall sit apart from each other, and hold separate courts at the same time for the dispatch of business; and all the powers, duties, rights, and privileges given or imposed by this act to or upon any assistant barrister or chairman, are, and shall be, by virtue of such warrant, given to and imposed upon such assistants or deputies; and all acts to be done by such deputies or assistants shall be of the same efficacy in law as if done by the assistant barrister or chairman upon whom such duties would have otherwise devolved under this act.

LXVII. And further, every barrister appointed to preside at any special sessions under this act (such barrister not being an assistant barrister or chairman) shall be paid at the rate of five guineas for every day that he shall be so employed, over and above his travelling and other expenses; and every such barrister, after the termination of his last sitting, shall lay or cause to be laid before the lord lieutenant or other chief governor or governors of Ireland, a statement of the number of days during which he shall have been employed, and an account of the travelling and other expenses incurred by him in respect of such employment; and such lord lieutenant or other chief governor or governors shall make an order for the amount to be paid to such barrister out of the consolidated fund; and in order to provide a remuneration for the assistant barristers or chairman for the additional labour imposed on them by this act, it shall and may be lawful for the said lord lieutenant or other chief governor or governors to direct that the said assistant barristers and chairman shall be paid, in addition to the salaries now by them receivable, such yearly sum, not exceeding in any case the sum of one hundred pounds, at the discretion of the said lord lieutenant, &c., as he or they shall by warrant under his or their hand direct, such additional salaries to be payable at the same time and in the same manner as the salaries of the said assistant barristers are now payable.

LXVIII. Provided always, that in order to enable the chairman of the sessions for the county of Dublin to discharge the duties imposed on him by this act, with regard to the registry of voters in and for the city of Dublin, at such sessions as are to be held for that purpose after the first or special sessions for registering voters, it shall and may be lawful for the chairman of the sessions of the county of Dublin to discharge the duties of such subsequent registries in and for the city of Dublin by a sufficient deputy, to be appointed by such chairman for that purpose, and which deputy shall be a barrister of six years' standing at the least at the Irish bar, and shall be approved of by the lord lieutenant or other chief governor or governors of Ireland; and all the powers, duties, rights, and privileges given or imposed by this act upon such chairman respecting such registries, are and shall be, by virtue of such appointment and approbation as aforesaid, given to and imposed on such deputy; and all acts done by such deputy, respecting such registries in and for the said city of Dublin, shall be of the same efficacy in law as if done by the said chairman himself; and such deputy shall, at the end of each sessions, be paid and remunerated in the same manner, and at the same rate, as any other deputy appointed to register votes under this act.

LXIX. And further, this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

## SCHEDULES TO WHICH THE FOREGOING ACT REFERS

## SCHEDULE A.

LIST OF ASSISTANT BARRISTERS AND CHAIRMAN BEFORE WHOM SESSIONS FOR REGISTERING VOTES IN EACH CITY, TOWN, OR BOROUGH ARE TO BE HELD.

SESSIONS FOR	BEFORE
Armagh borough . . . . .	Assistant barrister of Armagh county.
Athlone borough . . . . .	Assistant barrister of Westmeath county.
Bandon Bridge borough . . . . .	Assistant barrister of west riding of Cork county.
Belfast borough . . . . .	Assistant barrister of Antrim county.
Carlow borough . . . . .	Assistant barrister of Carlow.
Carrickfergus borough . . . . .	Assistant barrister of Antrim county.
Cashel borough . . . . .	Assistant barrister of Tipperary county.
Clonmel borough . . . . .	Assistant barrister of Tipperary county.
Coleraine borough . . . . .	Assistant barrister of Londonderry county.
Cork city . . . . .	Assistant barrister of east riding of Cork county.
Downpatrick borough . . . . .	Assistant barrister of Down county.
Drogheda borough . . . . .	Assistant barrister of Louth county.
Dublin city . . . . .	Chairman of sessions of county of Dublin.
Dundalk borough . . . . .	Assistant barrister of Louth county.
Dungannon borough . . . . .	Assistant barrister of Tyrone county.
Dungarvan borough . . . . .	Assistant barrister of Waterford county.
Ennis borough . . . . .	Assistant barrister of Clare county.
Enniskillen borough . . . . .	Assistant barrister of Fermanagh county.
Galway town . . . . .	Assistant barrister of Galway county.
Kilkenny city . . . . .	Assistant barrister of Kilkenny county.
Kinsale borough . . . . .	Assistant barrister of east riding of Cork county.
Limerick city . . . . .	Assistant barrister of Limerick county.
Lisburn borough . . . . .	Assistant barrister of Antrim county.
Londonderry city . . . . .	Assistant barrister of Londonderry county.
Mallow town . . . . .	Assistant barrister of east riding of Cork county.
Newry borough . . . . .	Assistant barrister of Down county.
Portarlington borough . . . . .	Assistant barrister of Queen's county.
Ros (New) borough . . . . .	Assistant barrister of Wexford county.
Sligo borough . . . . .	Assistant barrister of Sligo county.
Tralee borough . . . . .	Assistant barrister of Kerry county.
Waterford city . . . . .	Assistant barrister of Waterford county.
Wexford borough . . . . .	Assistant barrister of Wexford.
Youghal borough . . . . .	Assistant barrister of east riding of Cork county.

## SCHEDULE B.

OATH TO BE TAKEN BY VOTERS AT POLLING, BEFORE RETURNING OFFICER, SHERIFF, OR HIS DEPUTIES, IF REQUIRED ON BEHALF OF ANY CANDIDATE.

I, *A. B.*, do swear, [*or, being a Quaker, do affirm,*] that I am the same [*A. B.*] whose name appears registered in the certificate or affidavit now produced; and that my qualification as such registered voter still continues; and that I have not before voted at this election; and [*in the case of householders in cities, towns, and boroughs,*] that not more than one half year's grand jury or municipal cesses, rates, or taxes are now due or payable by me in respect of the premises in this certificate mentioned.

## SCHEDULE C. (No. 1.)

FORM OF NOTICE FOR HOLDING THE FIRST SESSION FOR REGISTERING VOTERS UNDER THIS ACT.

County, }  
City, } of  
Town, }  
or }  
Borough, }

[as the case may be.]

Notice is hereby given, that a session for the purpose of registering the names of persons

entitled to vote at the election of members [or a member] to serve in parliament for the county of [or the city of or the county of the town of or the borough of as the case may be,] pursuant to an act passed in the second and third years of the reign of king William the Fourth, will be holden at in the said county of [or city of or the county of the town of or borough of as the case may be,] on the day of next, by and before the assistant barrister of the county of [or before the chairman, or barrister, as the case may be,] at which time and place applications of persons claiming to be entitled to vote at such elections will be received and taken into consideration.

Dated this

day of

Clerk of the peace of the said county  
or [or county of the city, or county of the town.]

## SCHEDULE C. (No. 2.)

FORM OF NOTICE TO BE GIVEN OF APPLICATION TO BE REGISTERED AS A VOTER FOR A COUNTY, CITY, TOWN, OR BOROUGH.

Sir,

Take notice, that it is my intention to apply to be registered as a person entitled to vote at elections of a member or members to serve in parliament for the county of [or for the city, town, or borough] of and the particulars of my claim are as follows:

Name, description, and residence of applicant.	In what right claiming.	Description of property, if the same be in respect of property, with name of barony, townland, parish, street, or denomination, or place where situate.	Yearly value to be registered.
X. Y. of Yeoman, &c.	Freeholder.		
	Leaseholder.		
	Householder		
	Freeman.		
	Rent-charge.		

**LIST OF APPLICATIONS TO BE ENTERED BY THE CLERK OF THE PEACE.**

No.	Name, description, and residence of applicant.	Description of property, with name of townland, parish, street, &c., and right in which registry is claimed.	Yearly value to be registered.

**OATH OF FREEHOLDERS REGISTERING A FREEHOLD OF THE VALUE OF TWENTY POUNDS OR UPWARDS, NOT ARISING FROM A RENT-CHARGE, IN ANY COUNTY, CITY, OR TOWN.**

I, A. B., of \_\_\_\_\_ in the county [or of \_\_\_\_\_ in the city, town, or borough of \_\_\_\_\_] Esquire, clerk, [or as the description is,] do swear, that I am a freeholder in the county, city, or town of \_\_\_\_\_ and that I have now a freehold therein, arising from a house [or houses, lands, or both, or other hereditaments, as the case may be,] lying and being at \_\_\_\_\_ [naming the street or place where such house or houses or other hereditaments shall be situate or arise] in the county [city or town] of \_\_\_\_\_ of \_\_\_\_\_ of the clear yearly value of fifty pounds, or twenty pounds, [as the case may be,] at the least, above all rent and charges payable out of the same, except only public or parliamentary taxes, county, church, or parish cesses or rates; and that the said freehold does not arise from a rent-charge; and that I have not accepted or procured the said freehold fraudulently, nor in exchange for any freehold in any other county, city, town, or borough. \_\_\_\_\_ So help me God.

**OATH TO BE TAKEN BY RENT-CHARGER IN ANY COUNTY, CITY, OR TOWN.**

I, A. B., of \_\_\_\_\_ in the county [or city or town] of \_\_\_\_\_ Esquire, [or as the description is,] do swear, that I am a freeholder in the county of the city [or town] of \_\_\_\_\_ and that I have a freehold therein of the clear yearly value of twenty pounds at the least above all charges payable out of the same, consisting of a rent-charge, granted by deed or instrument bearing date the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ by A. B. of \_\_\_\_\_ on the lands of \_\_\_\_\_ [naming the lands, house or houses, or other hereditaments mentioned in such deed] in the county, city [or town] of \_\_\_\_\_ : and that I

am in the possession thereof to the clear amount of twenty pounds yearly, and am entitled to receive the same as it becomes due, to and for my own sole use and benefit; and that I have not procured or accepted the same fraudulently, nor in exchange for a freehold in any other county [city or town].

So help me God.

### SCHEDULE C. (No. 6.)

OATH OF FREEHOLDER REGISTERING A FREEHOLD OF THE ANNUAL VALUE OF TEN POUNDS IN ANY COUNTY, CITY, OR TOWN.

I, E. F., of in the county [city or town] of yeoman, [or as the case may be,] do swear, that I am a freeholder of the county [county of the city or the town] of and that I have a freehold therein arising from a house [or houses, land, or both, as the case may be,] of the clear yearly value of ten pounds above all rent and charges payable out of the same, except only public or parliamentary taxes, county, parish, or church cesses or rates, and cesses on any townland or division of any parish or barony, lying and being at [naming the townland or townlands or other denominations by which the place is generally known, and the barony or baronies, or the parish, and street or streets of the county, city, or town, as the case may be, wherein it is situate,] in the county [city or town] of ; and that the said freehold does not arise from a rent-charge, and that the same arises by virtue of the deed, lease, or instrument bearing date the day of in the year [or otherwise stating the nature of the title, as the case may be]; and that I am in the actual occupation thereof by residing thereon, [or by tilling or by grazing, or by both tilling and grazing, as the case may be]; [and where the freehold is held by any deed, lease, or instrument, adding these words, and that the freehold is not let or agreed to be let to the person or persons who executed the said deed or instrument, or to the heirs or assigns of such person or persons, or to any one in trust for him, her, or them, nor do I intend to let the same or any part thereof to such person or persons, or any of them, and that I have not agreed to let it for the term for which I hold it]; and that I have not procured or accepted the said freehold fraudulently, nor in exchange for a freehold in any other county, city, or town.

So help me God.

### SCHEDULE C. (No. 7.)

OATH OF LEASEHOLDER REGISTERING A LEASEHOLD IN ANY COUNTY, CITY, OR TOWN.

I, E. F., of in the county [or city or town] of farmer [or as the case may be,] do swear that I do now hold the lands of [or as the case may be, describing the tenement], situate, lying, and being at under a lease, [deed or instrument, as the case may be,] bearing date the day of in the year by and between ; and that such leasehold is now of the clear yearly value of twenty pounds [or ten pounds, as the case may be,] over and above all rent and charges payable out of the same, except only public or parliamentary taxes, county, church, or parish cesses or rates, and cesses upon any townland or division of any parish or barony; and that the said leasehold does not arise from a rent-charge; and that I have not accepted or procured the said leasehold fraudulently, nor in exchange for any freehold or leasehold in any other county, city, or town, [and if the said leaseholder be the lessee or assignee of a derivative term, or under lease,] that I am in the actual occupation thereof.

So help me God.

### SCHEDULE C. (No. 8.)

OATH TO BE TAKEN BY HOUSEHOLDERS REGISTERING AS VOTERS IN ANY CITY, TOWN, OR BOROUGH.

I, E. F., of in the city [town or borough] of merchant, [or, &c., as the case may be,] do swear, that I am, and have been for six calendar months last past, in possession and actual occupation of the house, warehouse, &c. [describing the premises]

situate at \_\_\_\_\_ in the said city [town or borough]; and that the said premises are *bona fide* of the clear yearly value of not less than ten pounds [or five pounds, *as the case may be*]; and that not more than one half year's grand jury or municipal cesses, rates, or taxes are now due or payable by me in respect to the said premises or any part thereof.

So help me God.

### SCHEDULE C. (No. 9.)

OATH TO BE TAKEN BY RESIDENT FREEMEN AND FORTY-SHILLING FREEHOLDERS WHOSE RIGHTS ARE SAVED.

I, A. B., of \_\_\_\_\_ in the city [or town or borough] of \_\_\_\_\_ merchant [or, *&c. as the case may be*], do swear, that I am a freeman or other corporate officer [*as the case may be*] of the said city, [town or borough,] having a right to vote at elections, for the said city [&c.] of \_\_\_\_\_ [or that I am a registered forty-shilling freeholder having a right to vote at elections for the said city, &c. of \_\_\_\_\_ *as the case may be*]; and that I am, and for the last six months have been, a resident within the said city [&c.] of \_\_\_\_\_ or within seven statute miles of the usual place of election in the said city [town or borough, *as the case may be*.]

So help me God.

### SCHEDULE D. (No. 1.)

CERTIFICATE OF RENT-CHARGER, FREEHOLDER, OR LEASEHOLDER.

County, }  
City, } of \_\_\_\_\_  
Town, } [*as the case may be.*]  
or }  
Borough }

This is to certify, that A. B., of \_\_\_\_\_ in this county, [city or town, *as the case may be*,] clerk, [merchant, gentleman, farmer, yeoman, &c. *as the case may be*,] was this day duly registered before me as a voter for this [county, &c. *as the case may be*,] in right of a rent-charge freehold [or leasehold, *as the case may be*] of the yearly value of fifty pounds, or twenty pounds, or ten pounds, or [*as the case may be*,] situate at [*describing the townland and place, &c.*] in this county, [city, &c.]

O. judge, chairman, or assistant barrister.  
O. clerk of the peace.

Certificate, No. \_\_\_\_\_ [&c.]

### SCHEDULE D. (No. 2.)

CERTIFICATE OF HOUSEHOLDER.

City, }  
Town, } of \_\_\_\_\_  
or } [*as the case may be.*]  
Borough }

This is to certify, that A. B., of \_\_\_\_\_ in this \_\_\_\_\_ was this day duly registered before me as a voter for this city [town or borough, *as the case may be*] in right of his house, &c. situate at [*describing the place and situation.*] Dated this \_\_\_\_\_ day of \_\_\_\_\_

O. judge, chairman, assistant barrister, or barrister, &c.  
O. clerk of the peace.

Certificate, No. \_\_\_\_\_ [&c.]

### SCHEDULE D. (No. 3.)

CERTIFICATE OF FREEMEN, &c.

City, }  
Town, } of \_\_\_\_\_  
or } [*as the case may be*]  
Borough }

This is to certify, that A. B., of \_\_\_\_\_ in this \_\_\_\_\_ yeoman [*or as the case*

*may be*] was this day duly registered before me as a voter for this city [town or borough, as the case may be], in right of his being a resident freeman [or resident forty-shilling freeholder, as the case may be]. Dated this            day of            at

O. judge, chairman, assistant barrister, or barrister, &c.

O. clerk of the peace.

Certificate, No.

[&c.]

On the 11th July, 1832, parliament prepared and passed an act which received the royal assent on the above date, for abolishing the punishment of death in certain cases, and substituting a lesser in place of it.\* By the act for consolidating and amending the laws in England relative to larceny, and other offences connected therewith, it is among other things enacted, that if any person shall steal in any dwelling-house any chattel, money, or valuable security, to the value in whole of five pounds or more, every such offender, being convicted thereof, shall suffer death as a felon; and, by the same act, whoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcass or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and suffer death as a felon on conviction.† And by another act for consolidating and amending the laws in Ireland relative to larceny and other offences, it is among other things enacted, that if any person shall steal any of the articles above enumerated, on conviction shall suffer death as a felon. It being, therefore, deemed expedient that a milder punishment than that of death should be inflicted for any of these offences, so much of the said acts which inflicted the penalty of death for any of the before named felonies were repealed; and, in place thereof, from and after the 11th July, 1832, any person convicted of any of the above named felonies, or of counselling, aiding, or abetting their commission, shall be transported beyond seas for life. This act expressly prohibits the governors or lieutenant-governors of any colony from giving any pardon or ticket of leave to any person transported, or who shall receive a pardon on condition of transportation, or any order or permission to suspend or remit the labour of any such person, except in cases of illness, until such person, if transported for seven years, shall have served four; if transported for fourteen years, shall have served six; or if transported for life, shall have served eight years of labour. It also determines that no person shall be capable of acquiring or holding any property, or of bringing any action for the recovery of any property, until such person shall have duly obtained a pardon from the governor or lieutenant-governor of the colony or settlement in which he or she shall have been confined: provided that nothing in the act, however, shall in any manner affect his majesty's royal prerogative of mercy.‡

\* 7 and 8 Geo. IV., c. 29.

† 9 Geo. IV., c. 55.

‡ 2 and 3 Will. IV., c. 63.



THE municipal law of England is divided into two kinds—the unwritten or common law, and the written or statute law. The unwritten law includes not only *general customs*, or the common law, properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are by custom observed only in certain courts and jurisdictions. Lord chief justice Wilmot has said, that “the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. Both statute law and common law originally flowed from the same fountain”—that is, from the sovereign, with consent and advice of his parliament. And lord Hale declares to the same effect, “that many of those things that we now take for common law, were undoubtedly acts of parliament, though not now to be found on record.”\* Though this is undoubtedly the origin of the greatest part of the common law, yet much of it certainly has been introduced by usage, even of modern date, which general convenience has adopted. Such for instance is the law of the road, that horses and carriages should invariably keep the left side of the road, and consequently in meeting should pass each other on the whip hand. This law has not been enacted by statute, and is so modern that professor Christian is the first who has mentioned it in a book of law. But general convenience discovered its necessity, and the judges have so far confirmed it, as to declare frequently at *nisi prius*, that whoever disregards this salutary rule, is answerable in damages for all the consequences. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as those relating to marriage, or murder. And, in consequence, merchants have frequently imagined that all their new fashions and devices immediately become the law of the land, which is a mistake: merchants ought to take their law from the courts, and not the courts from merchants.

The written laws of the kingdom are statutes, acts, or edicts, made by the king's majesty, by and with the consent of the three estates of parliament,—the lords spiritual and temporal, and commons in parliament assembled; of which *Magna Charta* is the oldest now extant, as confirmed in parliament, 9 Hen. III., though doubtless there were many acts before that time, the records of which are now lost, and their determinations are at present, perhaps, currently received for the maxims of the old common law.

Statutes are either general or special, public or private. A general or public act is an universal rule, that regards the whole community: and of which the courts of law are bound to take notice judicially and *ex officio*: without the statute being particularly pleaded, or formally set

\* Hist. Com. Law.

forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns: and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded.\* For instance, the statute to prevent spiritual persons from making leases for longer terms than twenty-one years, is a *public* act: because it is a rule prescribed to the whole body of spiritual persons in the nation: but an act for any particular bishop to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and that particular bishop's successors: and is therefore a *private* act. Statutes are also either *declaratory* of the common law, or *remedial* of some of its defects, and are therefore generally mentioned in contradistinction to penal statutes; declaratory, where the old custom of the kingdom is almost fallen into disuse or become disputable; remedial, those statutes which are made to supply such defects, and abridge such superfluities in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, or from any other cause whatsoever. And to accomplish this, the common law must be enlarged where it was too circumscribed, or restrained where it was too lax and luxuriant; which has given rise to another subordinate division of remedial acts, called *enlarging* and *restraining* statutes. In attending to the rules to be observed in the construction of statutes, it may be remarked, that there are three points to be considered in the exposition of all *remedial* laws: that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the parliament may have already provided. Again, a statute which treats of things and persons of an inferior rank, cannot by any *general words* be extended to those of a superior. Thus a statute treating of *deans* and *others having spiritual promotions*, is held not to extend to bishops. With respect to *penal* statutes, they must be construed *strictly*, though the statutes against frauds are to be liberally and beneficially expounded. The reason of this difference is, because the former statutes act upon the offender, whereas the latter upon the offence: and in all statutes, one part must be construed by another, so that the whole, if possible, may stand. Supposing the common law and a statute should differ, the former gives place to the latter; and an old statute is superseded by a new one. But if a statute which repeals another be itself repealed, the first statute is thereby revived without any formal words for that purpose.

Many places besides the realm of England are subject to its laws. Wales continued for many centuries independent of England; it was subdued

\* 13 Eliz., c. 10.

and divided among the conquerors by William I.; it was completely annexed to the crown of England by Edward I. in 1283; but, till the reign of Henry VIII. it was governed by its own laws. In the year 1535 an act of parliament declared that the dominion of Wales shall be for ever united to the kingdom of England: that all Welshmen born shall have the same liberties as other the king's subjects; that lands in Wales shall be inheritable according to the English tenures and rules of descent; that the laws of England, and none other, shall be used in Wales: with many other provisions with regard to the regulation of the police of this ancient principality. This union sent twenty-seven Welsh members into the English house of commons, which continued till the late reform bill altered the whole constitution.

On the death of Alexander III., a disputed succession to the crown of Scotland, gave Edward I. a pretence for meddling in its affairs, and partly by treachery, and partly by force of arms, he reduced that kingdom for a short time to the dominion of the laws of England. He carried the crown and regalia to England, with all its public records, the latter of which were lost in conveying them back to Scotland by sea, in 1660, in the reign of Charles II. Notwithstanding the happy accession of James I., Scotland continued for more than a century a separate and independent kingdom, although formed by nature to be but one people. Sir Edward Coke observes how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of their crowns, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as the most ancient and authentic book called *Regia Majestas*, containing the most ancient common law of Scotland, is extremely similar to that of Glanvil, which contains the principles of the English common law, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be easily accounted for, from a diversity of practice, in two large jurisdictions, which had no communication with each other, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

The municipal or common laws of England are, generally speaking, of no force or validity in Scotland; because, by the act of union, her own municipal laws were ordained to be observed, unless altered by parliament. The town of Berwick-upon-Tweed was originally part of the realm of Scotland, and, as such, was for a time reduced by king Edward I. into the possession of the crown of England; during which subjection, it received from that prince a charter which was confirmed by king Edward III. with some additions after it was ceded by Edward Baliol, to be for

ever united to the crown and realm of England; and it was particularly granted that it should be governed by the laws and usages which it enjoyed during the time of king Alexander III., before its reduction. James I. new-modelled its constitution, and granted a new charter, putting it upon an English footing. Though it has, therefore, some local peculiarities, derived from the ancient laws of Scotland, yet, it is now clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all the acts of the British parliament, whether specially named or otherwise.

Ireland, originally called Ierni, Hibernia, and also Scotia, was formerly governed by its own kings, till it was conquered by Henry II. It was denominated the lordship or dominion of Ireland, and the king was simply styled *dominus Hiberniæ*, lord of Ireland, till the 33d year of the reign of Henry VIII., when he assumed the title of king. Henry II. planted an English colony in it, from whom a great proportion of the present inhabitants are descended, and the laws of England were then received and sworn to by the Irish nation assembled at the council of Lismore; and, although Ireland continued from that time to the reign of George III. a distinct kingdom, still it remained in a state of dependence on England, and necessarily conformed to, and was bound by, such laws as the superior state thought proper to prescribe or sanction. At the time of its conquest, Ireland was governed by the Brehon law, so styled from the name of the Irish judges, who were called Brehons: to which the Irish clung tenaciously till Edward III. entirely abolished it by an act of parliament holden at Kilkenny, which unanimously declared it to be "no law but a lewd custom crept in of later times." The delay occasioned by sending over acts of the Irish parliament to the British ministry before they could pass into a law, created much inconvenience, which evil with some others, turned the attention of the English cabinet to a union of the two kingdoms, the articles of which have been already given, p. 267. This great political measure was completed on the 2d July, 1800, when an act was passed in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British empire.

The Isle of Man was formerly a distinct territory from England, and was not governed by its laws, neither, unless particularly named, did an act of parliament extend to it. It was anciently a subordinate feudatory kingdom, subject to the crown of Norway; then to king John and Henry III. of England, and afterwards to the kings of Scotland, which is the reason that the bishop of Sodor and Man has not a seat in the house of lords; it afterwards fell to the crown of England; and at length Henry IV. claimed the island in right of conquest, and conferred it on the earl of Northumberland; upon whose attainder it was granted under the title of

the lordship of Man, by letters patent, 7th of Henry IV., to Sir John de Stanley. It continued in his lineal descendents for eight generations, till the death of Ferdinand, earl of Derby, in 1594, when a controversy, concerning its inheritance, arose between his daughters and William his surviving brother: upon which, and a doubt which was started concerning the validity of the original patent, the island was seised into queen Elizabeth's hands. James I. granted it to several individuals; all of which having either expired or being surrendered, it was granted by James I. to William, earl of Derby, and the heirs male of his body, with remainder to his heirs general. On the death of James, earl of Derby, in 1735, the male line of William failing, the duke of Athol succeeded to the island, as heir general, by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had always maintained a sovereign authority, by assenting or dissenting to laws, and exercising an appellate jurisdiction. Though no English writ or process from Westminster was of any authority in Man; yet, an appeal lay from the lord of the island to the king of Great Britain in council. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue,\* authority was given to the treasury to purchase the interest of the then proprietor, for the use of the crown, in order to break up the asylum which it afforded for debtors, outlaws, and smugglers. This purchase was completed in the year 1765, and confirmed by parliament,† after which the whole island and all its dependencies were inalienably vested in the crown, and subjected to the regulations of the British excise and customs. The landed property, however, of the Athol family, their manorial rights and emoluments, with the patronage of the bishopric, and other ecclesiastical benefices, were excepted.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are chiefly the ducal customs of Normandy, as contained in an ancient book of great authority called *Le Grand Coustumier*. Writs from the courts of Westminster are of no force there; but the king's commission is: they are not bound by acts of parliament, unless particularly named therein. All causes are originally determined by their own officers, the bailiffs, and jurats of the islands; but an appeal lies from them to the king in council in the last resort.

Besides these islands, the colonies in more distant countries are also in some respect subject to the English laws. In colonies where the lands are claimed by right of occupancy, when found desert and uncultivated, and thereafter peopled from the mother country, then the English laws, being the

\* 12 Geo. I., c. 8.

† 5 Geo. III., c. 26.

natural birthright of the people, are established; but when already peopled and cultivated, and gained by conquest or ceded by treaty from other European nations, then the laws of the kingdom which originally held the sovereignty are respected, and so many of the English laws only are introduced as are applicable to the situation and condition of the new colony. Lord Mansfield has proved by learned arguments that the king can change those laws, as circumstances require, and that he has a legislative authority by his prerogative alone over a ceded or conquered country. The American and West India colonies are principally of the latter sort, and being no part of the mother country, but distinct, although dependent dominions, the common law of England, as such, has no allowance or authority there; they are subject, however, to the control of parliament, though they are not bound by any acts of parliament, unless particularly named. With respect to their interior polity, they are principally of three sorts. I. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions: under the authority of which, provincial assemblies are constituted, with the power granted to them by the crown of making local ordinances, not repugnant to the laws of England. II. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet, still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the king's right of sovereignty. III. Charter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from the mother country. They have a governor named by the king—in some proprietary colonies by the proprietor—who is his representative or deputy. They have their own courts of justice, from whose decisions an appeal lies to the king in council. Their general assemblies, which are their house of commons, with their council of state, which is their upper house or house of peers, with the concurrence of the governor, who is the king's representative, make laws suited to their own emergencies.\* But it is particularly declared, that all laws, bye-laws, usages, and customs, in practice, in any of the colonies which are repugnant to any law, made or to be made in England, relative to the said colonies, shall be utterly void and of none effect. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, an act of par-

\* 7 &amp; 8 Will. III., c. 22.

liament \* expressly declared that all his majesty's colonies in America have been, are, and of right ought to be, subordinate to and dependent on the imperial crown of Great Britain; which has full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain in all cases whatsoever. This authority was very forcibly exemplified and enforced by the statute † for suspending the legislature of New York, and by several subsequent statutes. By another act ‡ George III. was empowered to conclude a truce or treaty with the American colonies, and by his letters patent to suspend or repeal any acts of parliament which related to those colonies. And by the first act of the definitive treaty of peace and friendship between his Britannic majesty and the United States of America, signed at Paris, September 3, 1783, his Britannic majesty acknowledges the United States of America to be free, sovereign, and independent states.

The kingdom of Hanover and his majesty's other property in Germany, being entirely unconnected with the laws of England, do not communicate with this nation in any respect whatever. The English legislature had wisely remarked the inconveniences which had formerly resulted from the continental territories which the princes of the Norman line brought with them, and from Anjou and its appendages which fell to Henry II. by hereditary descent, and engaged England in foreign wars for nearly four hundred years, till, happily for the peace and prosperity of the nation, they were lost in the reign of Henry VI. From that time, they observed that our maritime interests were better understood, and more closely pursued; and, in consequence of resting from civil wars and being removed from continental politics, the nation began to flourish and become more considerable in Europe, than when her princes possessed continental territories, and her councils were distracted by foreign interests. In consequence of this experience and these considerations, a clause was wisely inserted in the act of settlement, § which provided, "that in case the crown and imperial dignity of this realm, shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament."

The main or high seas are part of the realm of England, and on which the courts of admiralty have jurisdiction, but they are not subject to the common law. The main sea begins at low water mark; but, between the high water and the low water mark, where the sea ebbs and flows, the common law and the admiralty have an alternate jurisdiction; one upon the water when it is full sea; and the other upon land when it is ebb.

The territory of England is liable to two divisions, the one ECCLESIASTICAL, the other CIVIL.

\* 6 Geo. III., c. 12.—† 7 Geo. III., c. 59.—‡ 22 Geo. III., c. 46.—§ 12 & 13 Wil. III., c. 3.

I. The ECCLESIASTICAL is primarily divided into two provinces, Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains several dioceses or sees of suffragan bishops: Canterbury containing twenty-one, and York three, besides the bishopric of Man, which was annexed to the province of York by Henry VIII. Again, every diocese is divided into archdeaconries, whereof in all there are sixty; each archdeaconry into rural deaneries, which are the circuit of the arch-deacons and rural deans' jurisdictions; and every deanery is divided into parishes.

II. The CIVIL division of the territory of England is into counties, hundreds, tithings, or towns, which division, as it now stands, seems to owe its original to Alfred: who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted *tithings*; so called from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, and is called the tithing man, the headborough, and in some countries the borholder, or boroughs-elder.

Tithings, towns, or villa, are of the same signification in law. A *city* is a town incorporated, which is or has been the see of a bishop. A *borough* is a town, either corporate or not, that sends burgesses to parliament. As ten families of freemen composed a town or tithing, so ten tithings or ten times ten families composed a superior division, called a hundred. The hundred is governed by a high constable or bailiff. In some of the more northern counties these hundreds are called *napentakes*, because the people at a public meeting confirmed their union with the governor by taking or touching his weapon or lance.

A county or shire is composed of an indefinite number of these hundreds. Shire is a Saxon word signifying a division: but a county, *comitatus*, is evidently derived from *comes*, the count of the Franks; that is, the earl or alderman of the shire, to whose government it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire, upon whom its civil administration is now entirely devolved. In some counties there are intermediate divisions between the shire and the hundreds, as *lathes* in Kent, and *rapes* in Sussex, each of them containing about three or four hundreds. These had formerly *lathe-reeves* and *rape-reeves*, acting in subordination to the shire-reeve. Where a county is divided into three of these intermediate jurisdictions, they are called *trithings*; and which were anciently governed by a *trithing-reeve*. These still subsist in the extensive county of York, where by an easy corruption they are called *ridings*.

There are forty counties in England, and twelve in Wales. Three of these, Chester, Durham, and Lancaster, are called counties palatine, so



called a *palatio*, because their owners, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king has in his palaces. They might pardon treasons, murders, and felonies; they appoint all judges and justices of the peace, all writs and indictments run in their names, as they do in the king's in other counties; and all offences are said to be done against their peace. These palatine privileges were in all probability originally granted to the counties of Chester and Durham, because they bordered upon enemies' countries, in order that the inhabitants might have justice administered at home, and not be obliged to go out of the county and leave it open to the enemies' incursions. Lancaster was created such by Edward III., in favour of Henry Plantagenet, first earl, and afterwards duke, of Lancaster. Of these, the county of Durham is the only one now remaining in the hands of a subject; for the earldom of Chester was united to the crown by Henry III., and has ever since given a title to the king's eldest son. The county palatine of Lancaster was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he usurped the crown of Richard II. and assumed the title of Henry IV. But he was too prudent to suffer this to be united to the crown, knowing the insufficiency of his title, lest if he lost the one he might lose the other also: for he knew that he possessed the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was entirely usurped: for, after the decease of Richard II. the right of the crown was in the heir of Lionel, duke of Clarence, *second* son of Edward III., whereas John of Gaunt, father to this Henry IV., was but the *fourth* son. And, therefore, in the first year of his usurpation he procured an act of parliament, ordering that the duchy of Lancaster and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner, as if he never had attained the regal dignity. Consequently they descended to his son and grandson, Henry V. and Henry VI., and the former added many new privileges and territories to the duchy. When the house of York asserted their just rights and recovered the throne, this duchy was declared by parliament to be forfeited to the crown, and at the same time it was incorporated, and ordained to continue as a county palatine, and also to make it parcel of the duchy: and farther, Edward IV. vested the whole in himself and his heirs, *kings of England* for ever, but under a separate guiding and government from the other inheritances of the crown.

The isle of Ely is not a county palatine, though sometimes erroneously called so, but is only a royal franchise: the bishop of Ely having, by a grant of king Henry I., *jura regalia* within the isle of Ely, whereby he exercises a jurisdiction over all causes, both criminal and civil.

There are also counties *corporate*; which are certain cities, some with more, some with less territory annexed to them: there are twelve *cities*, Lon-

don, Chester, Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, and York; and five *towns*, Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Pool, and Southampton. Out of special grace and favour, the kings of England have at different times granted the privilege to these cities and towns to be counties of themselves, and not to be comprised in the counties by which they are surrounded, but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein.\*

### COURTS OF LAW IN SCOTLAND.

**COLLEGE OF JUSTICE.**—Though the first institution of the College of Justice is generally attributed to king James V., yet, in all probability, his grand-uncle John, duke of Albany, who was regent of the kingdom during that monarch's minority, was its original projector and founder. Sir George Mackenzie informs us, that the duke of Albany formed the intended court on the model of the parliament of Paris; and accordingly applied to his kinsman, Pope Clement VII., for a bull, empowering him to tax the Scottish bishoprics for the support of his intended institution. This was warmly opposed by the clergy, which occasioned considerable delay; but in the end, the wishes of Albany and the young king, who had assumed the reins of administration, prevailed at Rome, and the Pope issued a bull on the 15th September, 1531, authorizing a contribution to be raised from the Scottish bishoprics and monastic institutions, of ten thousand golden ducats of the chamber (*ducatorum auri de camera*), for the maintenance of the senators. The bull also provided that one half of the senators should be ecclesiastical dignitaries, and the other laymen.

After providing for the maintenance of the ecclesiastical and lay dignitaries of this court, an act of parliament was passed on the 17th May, 1532, in the following terms: "Item, anent the second article concerning the ordour of justice, because our soverane is maist desyrrous to have ane permanent ordour of justice, for the universale wele of all his lieges, and therfore tends to institute ane college of cunning and wise men, baith of spiritual and temporal estate, for the doing and administracioun of justice in all civil actions, and therfore thinks to be chosin certane persones maist convenient and qualifiet therfor, to the nowmer of thirteen persones, half spiritual, half temporal, with ane president: The whilk persones sall be auctorizat in this present parliament to sytt and decyde upon all ac-

\* Blackstone's Commentaries on the laws of England, Professor Christian's edition, with his Notes, 1830—Statutes at large—Tomlin's and Jacob's Law Dictionaries—Jeremy Bentham's Rationale of Judicial Evidence—Cabinet Lawyer—Dalton's Office of Sheriffs—Dawson on the Origin of Laws—Burns' Ecclesiastical Law.

tiouns civile, and nane uthers to have voit with thaim, on to the tyme that the said college may be institute at mare laisare : and thir persouns to be sworn to minister justice equally to all persouns in sic causis as sall happen to com befor them, with sic uthir rewlis and statuts as sall pleise the king's grace to mak and geif to them for ordouring of the samin. The three estatis of this present parliament thinks this artikle well consavit. And therfor the king's grace, with avise and consent of the said three estatis, ordainis the samin to have effect in all points, and now ratifies and confirmis the samin ; and has chosen thir persouns underwritten to the effect for-said, quhais processes, sentences, and decretis sall have the samin strength, force, and effect as the decretis of the lordis of session had in all tyme bygane : Providing alwayis that my lord chancellor being present in this town or uthir place, he sall have voit and be principale of the said counsell, and sic uthir lordis as sall pleise the king's grace to enjoin to thaim of his gret counsell, to have voit siclik to the nomer of three or four."

Agreeably to this act, the court commenced its sittings on the 27th day of May, 1532, in presence of the king, and all the nobility and great officers of his court. Except in cases of war and pestilence, the court has regularly continued to sit ever since. During the usurpation of Cromwell, the functions of the judges were entirely superseded, and in place of this court, a set of commissioners for the administration of justice to the people of Scotland, was appointed by that military chieftain, and which interruption lasted from the year 1650, to the year 1661, when the restoration of the legitimate sovereign authority was naturally followed by the restitution of ancient laws and salutary usages. The judges of the College of Justice consisted of the lord chancellor, the lord president, fourteen ordinary lords or senators, and an indefinite number of supernumerary judges, called extraordinary lords. We shall now make some general observations regarding some of the more important of these offices, the qualifications necessary for filling them, and the honours, distinctions, and remuneration with which their services have been rewarded.

**THE LORD CHANCELLOR.**—This great officer of state is supposed to have derived his appropriate title from the Latin verb *cancellare*, it being his supereminent prerogative to alter or cancel any writ presented to the great seal, containing clauses, objectionable or prejudicial to the commonwealth. In Scotland, this office is of very high antiquity, and so early as the reign of Malcolm II., the chancellor had obtained precedency of all other officers of state. The mere delivery of the great seal constitutes the chancellor in England ; but in Scotland, the office was usually conferred by a commission under the great seal, containing a warrant also for appending the privy seal to the gift, the great seal being in the custody of the chancellor himself. Latterly, the office was conferred for life. The absolute rank of the lord chancellor does not appear to have been

fixed, until James VI. directed that Sir John Maitland of Thirlstane, who then held the great seal, should have the first place and rank in the nation, *ratione officii*. In 1626, Charles I. directed that the archbishop of St Andrews, as primate and metropolitan of the kingdom, should take precedence of the lord chancellor in council, and at all public meetings. It does not appear, however, that archbishop Spottiswood, then primate, was ever able to enforce this order during the lifetime of the earl of Kinnoul, who then, and for a few years afterwards, held the great seal. On the death of the earl of Kinnoul, archbishop Spottiswood was appointed lord chancellor of the kingdom, being the first and only instance since the Reformation, of a churchman holding that high office: he held the office till the beginning of the grand rebellion, when the episcopal order were excommunicated by the famous assembly which met at Glasgow in 1638; when, justly fearing personal violence, he fled to England, and died at London: he was interred in Westminster abbey by order of his affectionate master, and of course, while he held the seals, the point of precedency could not form any point of dispute. After the restoration, the order of precedence of 1626 was renewed in favour of archbishop Sharpe, who being less scrupulous or more successful than his predecessor, assumed the precedence, so much to the chagrin of lord Glencairn, the lord chancellor, that the degradation was supposed to have hastened his death. The twenty-fourth article of union provides, that there should in future be only one great seal for the united kingdom of Great Britain, but that a seal should be kept and used in Scotland, in all things relating to private rights and grants which had usually passed the great seal of Scotland. The last lord chancellor of Scotland was James Ogilvie, earl of Seafield, who, after the Union, was re-appointed lord chancellor of that part of Great Britain commonly called Scotland, an office which seemed incompatible with that of lord Somers, then lord chancellor of Great Britain. His lordship, however, took his seat, as head of the College of Justice, and asserted his right of presiding and signing the interlocutors of the court in virtue of his anomalous dignity, long after he had been appointed lord chief baron of the Scottish court of exchequer, and after the keeping of the seal directed to be used in place of the great seal, had been entrusted to another nobleman.

**LORD PRESIDENT.**—In the papal bull for the institution of the College of Justice, it is not specified whether the lord president shall be chosen from the spiritual or temporal side of the bench; but it seems clear from the bull of approbation granted by pope Paul III., that it was intended that that office should be held by a bishop: till the Reformation this rule held, and the four first presidents of the court were the abbot of Cambuskenneth, who happened to be a bishop, and the bishops of Orkney, Ross, and Brechin. By the act, 1579, however, this rule was abrogated, and

that part of the institution which bore that the president should be elected from the spiritual side and be a prelate, was dispensed with, it being at the same time declared, that the president should be possessed of the same qualifications as the ordinary lords.

The first president and the other lords were appointed directly by the king and three estates, but by whom his three immediate successors were nominated, does not appear, although I think it most likely to have been by royal authority. In 1567, when Sir James Balfour was elected, express mention is made of the votes of the lords in the abstract of the act of his admission. In 1579, however, an act was passed by which the choice of president was confided to the "hail senators;" and, accordingly, on the death of the lord president Provand, we find that the lords of the spiritual side, having chosen lord Urquhart, one of the temporal, and those of the temporal side, the parson of Menmure, one of the spiritual lords, the two candidates were removed, and the choice fell upon lord Urquhart. This form of election was kept up so late as 1633, when the lords, after receiving a letter from Charles I. recommending Sir Robert Spottiswood "as a persone for his sufficiency and experience able to bear that charge," then vacant by the decease of Sir James Skene, appointed Sir Robert Spottiswood, second son of the archbishop of St Andrews, and Sir Alexander Seaton of Kilcreuch, to be proposed as candidates; as in the former case they retired, and the lords elected Sir Robert Spottiswood, who was afterwards basely murdered by the dominant party for his steady attachment to his sovereign.

By the advice of parliament, Charles I. nominated in November, 1641, fifteen judges; but as no notice was taken of the office of president, the lords declared, that for the future, their president should only be elected for one session, and to the commencement of the next, and that the first act of any session should be the changing of the former president and the election of his successor. This plan continued to be the rule till Oliver Cromwell suppressed the court in 1550. On the restoration of Charles II., Sir John Gilmour was appointed constant president of the session, during the chancellor's absence, directly by the king, and since that period the crown has uninterruptedly exercised the right of patronage.

In point of precedence, it was settled by act of parliament in 1661, that the lord president, as an officer of state, should take rank before the lord clerk-register, lord advocate, and treasurer-depute.

The lord president's salary, as one of the fifteen ordinary senators, was the same as that of his brethren; but in respect of the dignity of his office, a pension from the crown was added, which gradually increased in amount in proportion as the coin was depreciated, and the manner of living altered. In the time of Sir George Lockhart this addition amounted to £700 per annum. In 1708, the lord president's salary amounted to £1000, and

was again increased in 1758 to £1300. In 1786 it was augmented to £2000, in 1799 to £3000, and in 1810 it was raised to £4300, at which it has ever since continued.

For many years the lords presidents possessed a rent-free house, which privilege they acquired in the year 1676, when, in consideration of his eminent services to his fellow citizens, the incorporation of the city of Edinburgh became bound to pay the house rent of Sir James Dalrymple of Stair, then president, and that of all his successors in all time coming. Lord President Forbes of Culloden renounced this privilege, and it has not been resumed by any of his successors.

**LORD JUSTICE CLERK.**—Originally, this officer was one of the fourteen ordinary lords of session, and although he had presided as the clerk or deputy of the grand justiciary, who was generally one of the great nobility, from the first institution of the court, yet he had no pre-eminence. But in the year 1808, when the court of session was separated into two divisions by the act 48 George III., cap. 151, it was declared, that the lord justice clerk should preside in the second division of the court; and, in consequence, he now takes rank immediately next after the lord president. The salary attached to his office is £4000. All criminal cases are tried by him as the presiding judge, and he travels the circuits in the same manner as the other judges.

**ORDINARY LORDS.**—By the original constitution of the court, the College of Justice consisted of fourteen senators and a president, and this number, through the long lapse of nearly three hundred years, and amid all the changes which have taken place in the constitution and jurisdiction of the court, continued unaltered, until it was at length reduced to thirteen (including the president) by act of parliament, 11 George IV. and 1 William IV. cap. 69.

The distinction of spiritual and temporal judges, provided by the bull of institution, was long carefully preserved; a churchman being always appointed when a vacancy happened on the spiritual side of the bench, and a layman when the deficiency happened in the temporal estate. But at length this distinction was ordered to "be suppressed and forgotten," by act of parliament, 1840, cap. 27, by which the judges were ordained to be wholly temporal.

The first appointment of the senators of the College of Justice was made by their founder, James V., with the advice of the three estates of parliament; but their successors, for upwards of one hundred years, were appointed directly by the crown: till in the year 1641, during the grand rebellion, Charles I. was forced to concede that valuable privilege, and to declare that he would nominate the judges with the advice and approbation of the estates, if the vacancy should occur during the sitting of parliament, and during its intervals, by the advice and approbation of the

majority of the senators themselves. To parliament, however, was reserved the power of confirming these appointments, or rescinding them altogether. At the Restoration, the crown resumed this branch of its prerogative, which had been wrenched from it during the turbulent period of the civil war in the reign of the first Charles. The estates declaring it to be an inherent privilege of the crown, and an undoubted part of the royal prerogative, to have the sole nomination of the lords of session, as in the former times preceding the year 1637. At the Revolution, the whole of the judges were nominated by the crown; but this exercise of the prerogative occasioned violent debates in parliament, and serious tumults out of doors, it being contended, that although the king had the power to nominate a single judge, who must be tried and found qualified by the others before he could be admitted, yet his prerogative did not extend to the supplying a total vacancy, when no such test of individual fitness could be applied.

In the original act of institution, no provision was made to secure the senators against the influence of the crown, by declaring their places permanent during their life or good behaviour. And for many years, their political conduct does not appear to have afforded any just grounds of dismissal. In 1641, when the triumph of rebellion enabled the chiefs of the Covenanters to dictate to their sovereign, they decreed that the officers of state and judges should be elected by consent of the estates, and that their commission should be *ad vitam aut culpam*. This ordinance, (for the decrees of the parliaments during the usurpation were not called acts, but *ordinances*,) was rescinded with many others at the Restoration, and a new commission was granted by Charles II. to the exclusion of several individuals who had been appointed judges for life by the estates. In 1681, a new commission was granted, in which the names of Sir James Dalrymple of Stair, then lord president, and of two other judges, were omitted, and their places supplied by others. At the accession of James VII., a new commission was again issued; and, having been displeased with the parliamentary conduct of Sir Alexander Seton of Pitmedden, he displaced that judge by a letter to the court, in the following terms: "For reasons known to ourself, we have thought fit to remove Sir Alexander Seton from being one of the senators of the College of Justice. We do duly authorize and require you to cause make the necessary intimation thereof to all concerned." Shortly afterwards, two judges (lords Edmonstone and Harcarse) were deprived, in consequence, as was generally supposed, of a vote given on the bench against the king's wishes; the letter on that occasion also bearing that they had been removed for reasons known to the king, and signifying his royal pleasure that they might no more be admitted. There can be no doubt that the political subserviency which disgraced the court, during the period which intervened

between the Restoration and the Revolution, was chiefly to be attributed to the debasing dependence to which this right of removal on the part of the crown reduced the senators. "The changing of the nature of the judges' gifts *ad vitam aut culpam*, and giving them commissions *ad bene placitum*, to dispose them to compliance with arbitrary courses, and turning them out of their offices when they did not comply," was accordingly assigned as one of the reasons for declaring the throne vacant in 1689; and since that time, the senators of the College of Justice have uniformly held their places during life or good behaviour.

As formerly noticed, the senators were to be cunning and wise men, but of this *qualification* the king was to be the sole judge; and it appears from the earliest admissions of the senators, that simply on the presentation of the king's letter and taking the oath *de fidei administratione*, the new judge was admitted without farther question. The first restriction on the power of presentation, arose in consequence of the change of the national religion. By the act 1567, it was provided, that "nae manner of persone nor personis be ressaift in ony tyme heerefter to beer public office removabill of judgement, within this realme, but sic as professes the puretie of religioun and doctrine now presentlie establischeit." In 1579, on a complaint that "the king elects and chooses young men without gravity, knowledge, or experience, not having sufficient living of their own, and that some of them by themselves, their wives, or servants, takes buddes, bribes, goods, and gear, so that justice in effect is bought and sold," it was enacted, that the king should nominate as a senator in future "a man that fears God, of good literature, understanding of the laws, of good fame, having sufficient living of his own, and who can make good expedition and despatch of matters concerning the laws of the realm." Those nominated were to be tried by the other judges, and if found disqualified might be rejected, they continuing to present, until an individual sufficiently qualified appeared. The nomination of John Lindsay, parson of Menmure, was made in terms of this statute, and he was accordingly tried before being admitted. In 1584, an act was passed prohibiting all employed in the ministry from being judges; but an exception was made in favour of Robert Pont, presbyterian minister of the West Kirk, who, by compromise with the General Assembly, was allowed to continue as one of the judges.

On the first August, 1590, when Archibald Douglas, younger of Whittingham, was admitted a senator, the court directed trial to be taken of his qualifications in the following manner: "The said Archibald, three days togidder, sall pass and ische in company with the ordinar lordis, reporters of interlocutors, in the utter tolbooth; and the said Archibald, all the samyn three days, sall mak report, in presens of the hail lordis of all alleagances, of all answers, duplies, &c., had and proponit be the parties



and procuratouris in the utter house, and all the space, the said Archibald to gif his opinion, in the first place, upon ilk questione, and interlocutor ; and thir three days being expirit, ordanis the said Archibald to sit in the inner house, and all the space to be heard to reason on ilk actioun and cause whilk sall happen to be callit during the time ; and the said sax dayes being bypast and all finissit, the lordis immediately thereafter sall pas to voting and consultation among themselves, and give answer to the king's majesty within written."

In 1592, it was enacted, that " nane sall be ressavit to ane place of ane senator in the College of Justice, except he be sufficiently tryit and knawin be his hienes and the haill lordis of session : that the said persoun sall have in yearly rent, properlie belonging to himself, the ssume of one thousan merkes usual monie of this realme, or els twentie chaders of victuall : and, that his experience, qualitie, and conversation may be the better tryit, that he be of the age of twentie-five years at the least complete in all time coming."

Two years afterwards, an act of sederunt was passed by king James VI., with consent of the court, having for its object the prevention of two crying evils connected with the presentation of the judges of the supreme court. The first of these was an abuse which had gradually crept in, of senators anxious to retire from the toils of office resigning their places into the king's hand, in favour of a person named in the deed of demission. This transfer of the judicial office was afterwards ratified by the king, through the influence of some favourite at court ; and the senators, overawed by the royal mandate, never ventured to dispute the admission of an individual so presented. It was now attempted to remedy this abuse by the act 26th June, 1593, by which it was declared, that in future, no resignation *in favorem* should be accepted of, nor any presentation proceeding thereon be admitted by the court ; and that all admissions of this nature which might occur hereafter should be null and void.

At the same time the crown consented to some additional restrictions on its presentations. The vacancy was not to be filled up until twenty days after it had occurred, in order to afford sufficient time for a judicious selection, and to disappoint the importunate solicitations of rapacious courtiers : and secondly, the king was to present at least three persons to the court, out of whom they were to select the individual who was, in their estimation, best qualified to fill the vacant situation. This act appears to have come first into operation in filling up the vacancy occasioned by the death of David Macgill, of Cranstoun-riddle, lord advocate ; and the manner in which the right of election was managed, is not a little singular and interesting. King James himself came to the court, and in his usual good-natured manner harangued the judges on the affection which

he had always felt towards the College of Justice, and the many honours and dignities which he had conferred upon the senators, more particularly the lately conferred privilege of electing their fellow judges. He then presented Mr Peter Rollock, bishop of Dunkeld; David Macgill, eldest son of the deceased, and John Preston of Fenton; all sufficiently qualified for the vacant office. Further, in order to ensure the election of the best qualified individual, the senators were sworn, that, according to the best of their knowledge and conscience, they should choose the most worthy person to fill the vacant office. On this occasion, the vote by ballot was adopted. The record expressly bears "that the said senatouris being ilk ane of them solemnly sworne to the effect as said is, *conjectis in pileum nominibus*, electit and chosit the said Maister John Preston as maist qualifiēt to occupie y<sup>e</sup> rowme in sessioun."

In 1605, James VI. further limited the number of persons from among whom the judges of the supreme court were to be elected. Those now declared qualified to be received as senators were, first, six advocates, who were to be selected by the court from the ancient, wise and learned advocates, "wha hes given best proof of their wisdome, learning, honesty, and good behaviour in the exercise of their procuracion," under the title of Elected, and which number the court were required to keep up: secondly, the principal clerks of session, having served two years in office: thirdly, peers of parliament, or their sons: and lastly, knights possessing a free revenue of £2000 Scots, yearly. The intrant-judges were further to swear, that they had neither directly nor indirectly procured their presentations, nor the resignations of their predecessors, by any sinister means, "for gold, or silver, or any other good deed and promise thereof:" and instant deprivation and the punishment of perjury were denounced against the guilty.

At the same time the judges were directed to prescribe a certain form of trial of "the sufficiency and literature in learning and knowledge" of all those aspiring to the rank of senators. They accordingly determined that in the first place, the chancellor, or in his absence, the president, should assign to the candidate one or more texts of the civil or canon law, on which he should discourse in Latin before their lordships in the inner house on the third day after, and for such space as they should enjoin. Secondly, the chancellor or president was directed to call, in presence of the candidate, any of the controverted actions then in dependence, which was to be fully pleaded before him. After the removal of parties, the candidate was then to resume the state of the process, narrating, in their due order, the various pleas, objections, and replies which he had just heard debated. He was then to deliver his own opinion on these various points, and on the action generally, it being incumbent on him, in doing so, to declare the reasons of his judgment. The court were then to

take his presentation into consideration, and admit or reject the candidate according as he had sustained the prescribed trial.

On the 17th February, 1649, the estates drew up an ordinance, that no person *malignant* and disaffected to the work of Reformation and the Covenants, that is, those who stood for episcopacy and the king, or against whom there existed any just grounds of suspicion of such disaffection, nor any person given to drunkenness, swearing, uncleanness, or any other scandalous offence, should thenceforward be chosen as a judge.

At the Restoration it was declared, that the admission of senators should in future be in conformity with the laws and acts of parliament before 1640. These were, however, frequently disregarded; and Sir George Mackenzie says, seats on the bench were given solely with regard to the political influence of those who obtained them. The judges then admitted were not subjected to any trial, but were required to take the oaths of allegiance and *de fide administratione*, and to subscribe an acknowledgment of the royal prerogative, which had been agreed to by the estates of parliament. On the admission of Sir David Nevy of Reidie, on the 26th June, 1661, the court, while they admitted Sir David without trial or examination, on the ground that he had been nominated by the king in place of the viscount Oxford, who had been named in the general appointment, but who had never accepted, resolved, that in future, persons appointed as judges should be tried and examined by the lords, and give proof of their "literature and knowledge of the laws and practick of this kingdom, conform to the ancient customes and acts of parliament maid thereanent."

In June, 1662, when Sir James Dundas of Arniston was appointed, instead of subjecting the candidate to the trial anciently prescribed, the court simply deputed two of their number to confer with Sir James, and to examine him privately "anent his literature and knowledge of the laws and practick of this kingdom, conforme to act of parliament." On the following day the committee returned a favourable verdict, and he was admitted accordingly.

This mode of private examination was not calculated to satisfy the public as to the legal qualifications of the men selected to be the supreme judges of the land, and it afterwards degenerated into a mere form. The candidate retired with two judges, who, after a few minutes' conversation, returned and reported him fully qualified for the vacant office. The temptation which this laxity offered to ministerial corruption to fill the bench with their own political friends, was abused by the unprincipled Lauderdale, who in two years appointed four of his own creatures, who had not so much as studied law. The complaints of the people, and the remonstrances of the duke of Hamilton and his party, who even introduced a bill on the subject into the committee of Articles, at length

procured redress. The king, with laudable attention to the purity of the bench, addressed a letter to the court, requiring them, with all possible speed, to present to his majesty the mode of trial they should think best fitted for proving the qualifications and sufficiency of those nominated. A committee was immediately appointed, and the result, which we owe to the patriotism of Charles II., was the act of sederunt of thirty-first July, 1674, and which still continues to regulate the admission of the College of Justice. By this act it is provided, that when any new lords of session shall be presented by his majesty for trial of their qualifications, they shall sit three days beside the ordinary in the outer house, and shall have inspection of such processes as are carried to interlocutor, and shall make report of the points taken to interlocutor, in presence of the whole lords. As also for completing their trial, they shall sit one day in the inner house, and after any dispute is brought to a period, and the lords are to advise the same in order to the pronouncing their interlocutor, they shall resume the dispute, and first give their opinion thereanent in presence of the whole lords.

It was enacted in the nineteenth article of the treaty of union, "that hereafter none shall be named ordinary lords of session, but such who have served in the College of Justice as advocates or principal clerks of session, for the space of five years, with this provision, that no writers to the signet be capable to be admitted a lord of the session, unless he undergo a private and public trial on the civil law before the Faculty of Advocates, and be found by them qualified for the same office, two years before he be named a lord of session, yet so as the qualifications made, or to be made for capacitating persons to be named ordinary lords of session, may be altered by the Parliament of Great Britain." Neither of the latter clauses of this article have ever been acted upon. No alterations in the qualifications of senators has been made by parliament, nor since the Union has any writer to the signet aspired to the bench.

In 1721, the court exercised its discretionary power in rejecting the nominee of the crown; this appears to have been the first instance in which they exhibited such a symptom of independence, and it is certainly a solitary one. In exercising this delicate privilege in the case of Mr Patrick Haldane, the court objected on the ground that he was not qualified in terms of the act of Union, which requires five years' practice as an advocate in the College of Justice; on which consideration the court held themselves entitled to decide on this objection, and accordingly refused to put Mr Haldane on the customary trial of his legal qualifications. Mr Haldane immediately appealed to the house of lords, who, on an *ex parte* statement, reversed the interlocutor of the court, and ordered their lordships to proceed with his trial. On motion for the application of this judgment, a new objection was taken to Mr Haldane's moral char-

acter, and a proof being allowed, the court was nearly divided as to its effect. Seven ordinary lords voted for his rejection, and lord president Dalrymple intimated his adhesion to their opinion. Six ordinary lords voted for Mr Haldane's being admitted to trial, and as they were joined by two extraordinary lords, they would thus have constituted a majority of one. The right of the extraordinary lords to vote in a question of this nature being questioned, and there being evidently no manner of settling the dispute, the whole affair was referred to the king. Of this reference no notice appears to have been taken, but Mr Haldane's appointment was withdrawn, and an act of parliament, 10 Geo. I. c. 19, was passed, abolishing the office of extraordinary lords, and in the matter of admission of judges, the powers of the court were limited to the mere form of certifying to the crown any objection which they might have to the candidate's qualifications, in order that the royal pleasure might be known thereupon; and if after this the king should declare his pleasure that the person so objected to should be admitted, the court were directed "forthwith to admit and receive him accordingly."

It has been already mentioned, that some months previous to the institution of the College of Justice, ten thousand golden ducats were levied from the ecclesiastical estate by the bull of pope Clement VII. for the support of the senators. From the taxed roll of the contributions still preserved in the books of sederunt, the sum levied appears to have amounted to £1423, 18s. Scots; but was so reluctantly paid, that the yearly salary of the judges in 1549 amounted only to £40 Scots, or £3, 6s. 8d. sterling. In 1563, they received from queen Mary £1600 Scots, annually, out of the quot silver, a revenue raised by the crown arising from the fees for the confirmations of wills, which had formerly been enjoyed by the bishops. In 1610, when king James restored the episcopal order to their rights and privileges, the quot silver reverted to them for the original purpose, and in place of the quot silver, James conferred on the judges the sum of £10,000 Scots, paid out of the customs. In 1633, the revenue of the College of Justice was still farther increased by a tax of ten shillings Scots, then imposed upon every pound land of old extent yearly for four years, the produce of which the senators were directed to lay out on heritable or other security, and to divide the interest among themselves in the same manner as the sums they already possessed. After the Restoration, parliament voted the sum of £12,000, which, with the yearly sum of £10,000 Scots, paid by the king out of the exchequer, afforded their lordships a salary of £200, sterling, each.

Shortly after the Union, queen Anne raised the judges' salary to £500. In 1758, their incomes were augmented to £700, and in 1786, to £1000. In 1799, they received a further augmentation of £280, and in 1810, their lordships' salaries were placed on their present footing, viz. to the

commissioners of justiciary who travel the circuits, £2600, and to the other judges £2000, per annum.

**EXTRAORDINARY LORDS.**—In the original act of institution it was declared, “that sic uthir lords as sall pleise the kingis grace to enjoin to thame of his grit counsell, to have vote siclik to the nowmer of thre or four.” This power of nominating additional, or, as they were termed, extraordinary lords, was speedily abused by the crown ; seven, and sometimes more noblemen being often added to the ordinary judges, and frequently appointed for the trial of particular causes. In 1555, the evil had become so great as to excite the complaints of the senators themselves, who entreated Mary of Lorraine, then regent, to reduce the supernumerary lords to the original number of three or four, and to order their constant attendance at the advising of all cases, and not merely at those of themselves or their friends. The number was accordingly gradually reduced, and at length king James VI., by a letter to the court dated 28th March, 1617, promised that there should in future be only four ; but the other evil complained of was never remedied, the extraordinary lords attending the court only at such times as they themselves thought proper. There was no check on the choice of the crown in their nomination, as the qualifications required by statute of the ordinary senators, were not held to extend to them. Even when bestowed, the office was in the highest degree dependent on the crown, as the extraordinary lords were removable by the mere will of the sovereign, with or without cause assigned. It should not therefore excite astonishment, that as the science of law became more and more difficult, the incongruity of allowing individuals, altogether ignorant of its intricacies and its “glorious uncertainties,” to decide such important causes as came before the supreme court, should have awakened the attention of lawyers ; more especially as the presence of the extraordinary lords, generally, proceeded either from political subserviency or personal motives. This part of the constitution of the court of session at length yielded to the enlightened influence of the times, and the voice of public opinion. Accordingly, the statute of George I. c. 19, enacted that any vacancy which should thereafter occur among the extraordinary lords was not to be filled up. This useless and pernicious office expired with John Hay, marquis of Tweeddale, who died on the 9th December, 1762. The extraordinary lords derived no emolument from their appointments ; their advantages consisted in the opportunity afforded them of obliging themselves and their friends at the expense of justice and judgment, when these stood in their way.\*

**COURT OF SESSION.**—Of the many alterations which, through successive revolutions, must of course have taken place in the public administration of justice in Scotland, none, perhaps, has been so radical or

\* Haig and Brunton's Historical Account of the Senators of the College of Justice.

so permanent in its influence as that which was occasioned by the introduction of the feudal system.

The sovereign was, and still continues to be, the great source and fountain of all justice. Under him, when the feudal system was in full operation, the barons who followed him to the field were vested with subordinate jurisdictions, assigned them by their sovereign, as the reward of their military services. The magistrates of towns possessed a similar territorial jurisdiction within their respective burghs, which, in course of time, became gradually more distinct and separate from that enjoyed by the baronial courts.

Besides these, early acts of parliament mention frequently other jurisdictions; and, as far back as our authorities reach, we find the king's chamberlain, the justiciar or justice-general, and sheriffs ranked among the ordinary judges of the land. The progressive steps by which a cause arrived at the court of last resort, were these: if it originated in the burgh courts, an appeal lay to the chamberlain-eyre, and from that to the court of four burrows. If again it originated in the burgh courts, an appeal lay first to the sheriff, then to the justiciar, and lastly to the parliament. The reason why an appeal was competent to the parliament in the latter case, and not in the former, is ingeniously given. "The bishops, barons, and freeholders composed the high court of parliament; originally the burrows had no place in that assembly." The *curia quatuor burgorum* was an earlier institution than the representation of burghs in parliament. Now trial by peers was a fundamental principle in the law of Scotland, as well as of England; therefore it was natural to appeal to parliament in causes concerning the barons, but not the burghs; for they had no peers there. In the court of four burghs were their peers; and, therefore, it was their court of last resort.\*

The ancient supreme judicatories were "the court of four burrows," and the high court of parliament; the former judging in those questions which had originated in the burgh courts, the latter again in those which had been moved before any other of the ordinary judges. These two supreme judicatories would seem to have acted not only as courts of review, but sometimes as courts of the first instance. More lately, recourse from the ordinary judges could be had only to the king in council, who exercised a supreme and cumulative original jurisdiction in cases competent before the other courts. This system was found to be extremely inconvenient; it not only imposed an insupportable burden on the king, but was also insufficient for the public service. To remedy this, an act was passed in 1425, which ordained that the lord chancellor, with certain discreet persons of the three estates to be nominated by the king, shall

\* Arnot's History of Edinburgh, p. 467.

thenceforward sit three times in the year, where the king chose to appoint, to know, conclude, and finally determine all and sundry complaints, causes, and quarrels that may be determined before the king and his council. By a subsequent statute of James II. the jurisdiction of this court is explained, and in some points considerably enlarged. It would, however, appear from this last act that its jurisdiction was never privative, but merely cumulative with that enjoyed with the judges ordinary, for it expressly leaves the parties complaining at full freedom to follow their actions before the said lords or their ordinary judge.

Thus constituted, the court of session does not seem to have answered the expectations of its framers. It laboured under many inconveniences ; its time and place of meeting depended on the will of the sovereign ; in this respect it was little better than the court of the king and council, whose inconveniences it was intended to remedy. But this was not the worst ; the judges of which it was composed were so exceedingly fluctuating, changing by rotation every forty days, that regularity or consistency of decision was impossible. The evil was still farther increased by the rotation not coming round to them again, " peradventure for seven years." They were, besides, to officiate purely " of their own benevolence," and at " their own costs ;" and it cannot surprise any one that, under such circumstances, these judges were exceedingly negligent.

A court like this was not destined to be permanent. Accordingly in a few years its jurisdiction, though not expressly abolished, was entirely altered. The act of 1469, ordained that a party complaining in any part of the realm should first complain to his judge ordinary of temporal lands, as justices, sheriffs, stewards, baillies or barons, provost or baillies of burghs, at whose hands, if he received justice, he was to remain content ; but if the judge ordinary " faikies him," and will not administer justice, then he might appeal to the king and his council. Not the slightest mention of the court of session is once made throughout the whole of this act, neither as a court of first instance nor as a court of review ; but the king's own jurisdiction is expressly reserved in these words : " it shall be lawful to the king's highness to take decision of any matter that comes before him at his pleasure, (*empeasance*,) like as it was wont to be of before." This exception gives to the omission of the court of session a more peremptory and decisive character ; and seems again, by its extinction, to have thrown the burden of judicial business on the king and council. For their own relief they enacted in the parliament of 1487, " that all civil actions, questions, and pleas whatsoever, should be determined and decided before their judge ordinary, so that no actions, &c., should come before the king and council, except such as pertained especially to the sovereign, actions and complaints made by kirkmen, widows, orphans, pupils, and strangers of other realms, and complaints on officers



for neglect of their several duties." This act was only temporary till the meeting of the next parliament ; and king James III. dying soon after, it was not productive of any good. The king and council were still burdened with the load of judicial business ; and to relieve them an act was passed in the beginning of the sixth parliament of James IV., by which a new court was constituted, styled the " Daillie Council."

This court was to be chosen by the king, and to sit in Edinburgh, or wherever the king should reside, and was to have the same power as the lords of session.

The constitution of this court was defective ; its jurisdiction was too confined. Lord Stair considers that it was merely a court of first instance, having no authority as a court of review, and the great weight of appeals fell on the justiciaries, or the chamberlain and his court of four burrows. The " Daillie Council " does not appear to have been more successful or of longer duration than its predecessor, nor during the period of its brief existence does it appear to have been productive of any very beneficial effects to the country.

Two attempts to create such a court as might be calculated to advance the ready administration of justice had now failed ; but the matter was of too great importance to be dropped solely on that account. The difficulties of the undertaking only encouraged each successive king to attempt a task in which his predecessor had been foiled, and complete success was reserved for the efforts of a sovereign who was then under age.

We have, in the beginning of this article, given an historical account of the court of session, as originally instituted by king James V., on the model, as we are informed by the celebrated Sir George Mackenzie, of the parliament of Paris, as a *supreme* court under the dignified and imposing title of the COLLEGE OF JUSTICE. We, therefore, refer to it for such particulars as we do not think necessary to repeat in this place. This court did not labour under the disadvantages which destroyed the utility of the institutions just described. The number of its judges were expressly fixed. It was to consist of " fourteen persons, one half spiritual"—that is, of bishops ; " one half temporal, with a president—cunning and wise men, most convenient and qualified for the administration of justice." Of these, any ten, with the president, were a quorum ; but besides these judges, the sovereign reserved to himself the right of appointing extraordinary lords, as already described. Its jurisdiction was more extensive than either of the former had been ; its judges were authorized " to sit and decide upon all actions civil, and none others to have vote with them."

The place and periods of its meetings were also determined, and full power granted to its members " to advise, counsel, and conclude upon such rules, statutes, and ordinances as shall be thought by them expedient to be kept and observed in their manner and order of proceeding at all times."

Considering the character of the times, the constitution of this court must be allowed to have been wonderfully perfect. It continued long to answer every purpose for which it was intended, under the regulations from time to time established by the judges under the title of acts of sederunt. Nevertheless it was not entirely free from defect. The sovereign's privilege of nominating extraordinary judges, generally ignorant both of the law and its fundamental principles, and also of judicial proceedings, could not but lead to abuse. It presented too strong a temptation not to be perverted to purposes purely political; and the effects of this perversion were more than once severely felt, and as severely remonstrated against, before the crown would yield up a source of influence so extremely powerful. It was at length, however, enacted, "that whenever the places of the then present four extraordinary lords should become vacant, no nomination should be made to supply the vacancy;" since which enactment, the court of session has consisted only of the fourteen ordinary lords and their president.

Besides these, several other alterations on the original constitution of the court were, in the course of time, discovered to be necessary. The change in the religious sentiments of the nation was inimical to the original plan of the court, when one half were to be bishops or other spiritual persons. In order, therefore, to remove churchmen entirely from the court, the following act passed in the parliament of 1584, in the reign of James I. : "The king's majesty, and his three estates assembled in this present parliament, earnestly desirous that all his loving and gude subjects shall be faithfully instructed in the doctrine of their salvation, and that the ministers of God's word and sacraments may the better attend upon their own charges and vocation, therefore statutes and ordains that none of the said ministers shall in any ways accept, use, or administer any place of judication in either civil or criminal causes, neither to be of the college of justice, commissioners, advocates, court-clerks, or notaries in any matters, (the making of testaments only excepted,) under the pain of deprivation from their benefices, livings, and functions." During Cromwell's usurpation this exclusion was extended to all clergymen generally; but the act only contemplated the prelates. Although this act, as well as all the other acts of the rebellious parliaments, was rescinded, yet it has been acted upon in spirit ever since, and no clergyman has since the Restoration been a member of the college of justice.

The court still meets in the original session house, and which was early divided into the outer and inner house. With the exception of the lord president, the ordinary lords sat alternately in the outer house, each for the space of a week, hearing and determining in the first instance such causes as were brought before the court. In their character of weekly ordinaries, it was impossible for the judges to bring many of the causes

thus brought before them to a conclusion, till long after their week was expired. The court framed many regulations, to afford them opportunities of bringing up their arrears, by assigning them certain hours for sitting at the side bars in the outer house.

While the ordinary for the week was occupied in the outer house, the lord president, with the other ordinary lords, were equally occupied in the inner house. There they occasionally determined certain special causes in the first instance, which, on account of their extreme importance, or the necessity of despatch, were intrusted to the decision of the whole court. But they were chiefly occupied in reviewing the judgments of the weekly ordinaries, which either plaintiff or defendant were entitled to bring by a reclaiming petition, if dissatisfied, before the whole judges. This privilege of petitioning was, however, limited by the rules of the court to a certain definite period, beyond which the decrees of the weekly ordinaries became final, and by a sort of fiction of law were regarded as decrees pronounced by the statutory quorum of the judges in the inner house. Lord Bankton observes, that "this court is justly admired for its contrivance, in order to despatch of business, and at the same time with great solemnity and deliberation. It is, in effect, fourteen superior co-ordinate courts all in one ; because the sentence of each of the ordinaries is, after extract, equal to that of the whole. And the whole lords, *in presentia*, may be regarded as a court of appeal, where the judgments of the respective ordinaries may be summarily, before extract, reviewed, and, if wrong, reversed."

Besides these weekly ordinaries, there were certain others appointed to attend in the outer house, both by express statute and by act of sederunt. These were the ordinaries upon witnesses, the ordinaries upon concluded causes, and the ordinaries on the bills. In the course of practice, the duty of the latter was soon united with that of the weekly ordinary in the outer house. Their different duties and powers, and the order of rotation in which they should succeed each other, were repeatedly the subject of regulation by acts of sederunt ; but the whole system has lately undergone a radical change. Under the system just described, modified as it was by different acts of the legislature, as well as by various acts of sederunt passed by the judges themselves, the administration of justice in Scotland was carried on, for nearly three centuries, with very considerable success. The decisions of the judges, regularly collected by the reporters, gave the laws a more consistent and unvarying interpretation, as well as diffused their knowledge more widely over all classes of the people. These certainly were inestimable benefits. But commerce growing more extended, the laws became, of course, more multifarious and involved ; litigation increased ; and the college of justice began to lose its reputation for celerity of decision.

The constitution of the court was not calculated to carry through a multiplicity of business with despatch. This was rendered impracticable by a variety of circumstances. The lord ordinary discussed all causes put in the roll, during the week that he sat in judgment. These causes were seldom determined upon a single hearing, and the judge had a power of altering his own sentence as often as he inclined. Each of the lords came once or oftener in the week, to the outer house, to hear pleadings, or give judgment upon those causes which came first before him when he sat as lord ordinary; and, upon which, many written cases, or representations, as they were called, might have been laid before him. If the parties did not acquiesce in the lord ordinary's judgment, which, in matters of any importance was always the case, application was made for altering the sentence, by a printed petition presented before the whole of the lords. Besides petitions, various printed papers were produced, under the titles of state, case, proof, information, answers, replies, and duplies; yet, notwithstanding these voluminous papers, the lords often heard pleadings in the same cause, and these commonly very prolix, often taking up the court a whole week, sometimes three weeks. Considering the copiousness of the printed papers which were laid before the judges, to have both these and pleadings in the same cause, was apprehended to be, in general, superfluous, and to be a great waste of time.\* It has been calculated that, throughout the whole year, each ordinary could not allot more than sixty-four hours in court to the duties of his department in the outer house; and as all the causes which came before the court of session having, with a few immaterial exceptions, to pass, in the first instance, through the hands of the lords ordinary, this short space of time was far from being adequate. Besides, each individual judge, to follow the same calculation, having in the course of the year to read and consider not less than *thirty thousand* quarto pages of letter-press for the duties of the inner house, and nearly one half of that number for those of the outer house, it was totally impossible for him to do justice to the causes before him, and, at the same time, to surmount so insuperable a barrier in the way of despatch.

But there was another evil of equal magnitude, even after the cause had at last found its way into the inner house, arising from the number of judges on the bench. The difference of opinion, which could not fail to arise from the different views of the case that suggested themselves to the minds of so many judges, often gave rise to discussions, the result of which retarded the progress of the cause. Few pleas could be brought before the court without plausibility enough to secure the vote of one or more of the judges; which fanned the flame of litigation in the breasts of

\* Arnot's History of Edinburgh, p. 478.

the parties. Among so many discordant decisions, too, the grounds of the judgment could not always be traced ; and it was often difficult to decide what had actually been the law of the case. As the court was one both of law and equity, it necessarily happened, that it decided sometimes on the principles of the one, sometimes of the other; and as, when no invariable rule is observed, different men must frequently conceive different notions of the importance of a point of form, it happened that the appointed forms of proceedings before the court, were sometimes adhered to, and sometimes not ; so that in a case where there was any discrepancy between law, equity, and form, it was impossible to pronounce beforehand, with a high degree of probability, upon the decision of the court. There were still other circumstances which conspired to increase their latitude in giving judgment, and to render the issue of trials before them more uncertain. By the Scots law, acts of parliament may go into desuetude; so that, in bringing an action upon a statute, it comes sometimes to be debated, whether the act libelled be in force or not. Nay, it came frequently to be a matter of question, whether certain British statutes extended to Scotland. If there were two or more points in a cause, sometimes the court decided the controversy by one general vote upon the matter at issue. At others, they would have as many votes upon the cause, as there were points and branches in it ; so that a person might convince *eight judges out of eleven*, that his antagonist's claim was ill founded, and yet that claim be sustained.\* This uncertainty was a pregnant source of delay, which was the less easy to be corrected, as it originated with the judges themselves. The inevitable result was the daily increase of arrears; and each returning session only loaded the judges' tables with a greater mass of papers.

Such evils and inconveniences had long called for redress, and different plans had been proposed ineffectually ; but at last, in the year 1806, during Mr Fox's administration, the legislature turned their most serious attention to the subject, and lord Grenville submitted a series of resolutions to the house of lords, as an avowed preliminary to bringing in a bill for remodelling the courts of justice in Scotland. These resolutions were circulated among the public with the most solicitous care ; ministers were anxious to collect the sense of the country, and, therefore, did not precipitate the measure. Their plan was not entirely free from objection; but in the midst of their deliberations ministers found it expedient to resign. Their successors showed no inclination to oppose this measure, and as the house of lords had pledged themselves to take the subject into their consideration, the new ministers, in the first session after their accession to office, passed an act, differing indeed in many essentials from the resolu-

\* Arnot's History of Edinburgh, p. 477.

tions originally submitted, but at the same time agreeing with them in others of almost equal importance.

One of the grand leading features of the original plan was the division of the court into such number of separate chambers as might be found convenient ; each to act as a distinct court. Besides these, a new court of review was to have been erected, from which alone appeals should be competent to the house of peers ; but the statute just mentioned, while it adopts the principle of splitting the court, rejects the suggestion of a new court of review. In this particular, the departure from the original resolutions of the house of lords is perhaps an improvement. There were already too many stages through which a cause might be carried by successive appeals. To multiply these would have encouraged rather than repressed the spirit of litigation, and would have added to that very delay which it was so much the object of reform to do away.

There was another very radical difference between the two schemes. The view of the original projectors was to introduce the form of trial by jury in many of the cases brought before the court of session, which might have been done in several instances with a beneficial effect. The act in question merely appointed commissioners, who were to report on various matters relative to the procedure before the court ; and among others, "in what cases, and in what manner and form, it appears to them that jury trial could be most usefully established in that court ;" but the public has not yet been informed whether any report was ever made. The plan carried into effect has been productive of great benefit. It speedily cleared the tables of the court of that continually accumulating mass of cases which created so much delay even in the most trifling questions, and often occasioned the most serious distress in those where more important interests were at stake.

This plan, important in its results as it proved to be, was not less simple in its conception. It was nothing more indeed than separating the whole judges already on the bench into two divisions, forming two totally distinct courts, with co-extensive powers, privileges, and jurisdictions. The first division was composed of seven of the ordinary lords of session, and the lord president of the whole court. The lord justice clerk, and the remaining six ordinary lords of session, formed the second division. The lord president, and the lord justice clerk, when present, preside over their respective divisions ; when these chiefs were absent, the judges of each division were empowered to appoint one of their own number to preside *pro tempore*.

For the routine of judicial business, four judges in each division were declared to be a quorum ; but in framing acts of sederunt the same forms and requisites were necessary as before. They, of course, could only be passed "by the whole court, or a quorum thereof consisting of

nine of the judges." With few exceptions, the new courts exercised the same duties, powers, and functions, in all respects, as had formerly been exercised under the old form of the court. As the number of the inner chambers was doubled, the number of the officiating judges in the outer house was increased in a like proportion. Two of the ordinary judges (excluding the lord president and the lord justice clerk,) were appointed to officiate each week, one for each division, "for hearing causes in the rolls of suspensions, advocations, regulations, and ordinary actions;" and two others, in the same manner, officiated in the bill chamber during the time of session.

Such is a brief outline of the principal features of that act, which made the first great step towards a reform in the constitution of our superior court. It contained besides, as has already been mentioned, a clause reserving to his majesty the nomination and appointment of certain persons "to make inquiries into the form of process in the court of session, and to report on various matters therein particularly set forth." His majesty was graciously pleased to appoint certain commissioners; inquiries were made, and reports on some of the points, at least, have been submitted to the public. In consequence of these reports another act was passed,\* chiefly indeed for the purpose of abridging the form of extracting decrees, but into which also some farther alterations on the form of the court were contrived to be introduced.

Notwithstanding the great relief afforded to the judges, it had been found, by the division of the court into two chambers, that it was still too much for one judge to be burdened with the business of both the inner and the outer house; and that it was next to impossible that he could give that despatch which was so extremely desirable; and, at the same time, afford such a strict attention to the whole cases before him as was indispensable for the proper discharge of his duty. The new act, therefore, on the narrative that "it would facilitate the despatch of business in the court of session, if the duty of the outer house were done by a certain number of the ordinary judges officiating there in a more permanent manner than the present weekly rotation among the whole," enacted "that the three junior ordinary judges of the first division of the court of session, and the two junior ordinary judges of the second division, shall be relieved from attendance in the inner house, and shall, after the passing of this act, not sit therein, but shall sit as lords ordinary in the outer house, to perform the business of the outer house. Although this regulation extended to the duty of administering oaths and examining witnesses, it did not extend to the bill chamber; the business in which was ordered to be done as before, by the whole ordinary lords in rotation.

\* 59 Geo. III.

As it was conjectured, however, that some, if not all, of the five then existing junior judges who were affected by this new regulation, might object to its extension to them, out of delicacy its operation was deferred, and the course of rotation appointed to remain as it then existed, until either by their own consent, or the appointment of new judges, the requisite number should be obtained "for carrying the said system into execution." So soon as this should take place, the quorum of both the inner chambers was to be reduced to three, and the remaining judges were immediately to be "relieved from attendance in the outer house, and from performing the duties of lords ordinary therein." This improvement on the form of the court was not, however, immediately carried into effect. As had been anticipated, few of the judges who had been appointed prior to the passing of the act were inclined to banish themselves permanently to the outer house; and a great length of time might have elapsed before the new system could have been introduced, had not a melancholy fatality deprived the bench, within a very short period, of some of its brightest ornaments, and thus made room for the requisite number of new appointments. Every thing was now ready for the change, but it was discovered that there were still a few alterations that could be made with good effect. The act just recited did not go into such detail as was considered necessary, and another act was passed for the purpose of finally setting the matter to rest.

By the provisions of this latter act, the whole business of the five junior judges, and their different departments, are distinctly determined. The junior of the three ordinary judges of the first division, who by the former act had been ordered to sit permanently in the outer house, is appointed to "officiate exclusively as lord ordinary on the bills, and perform the whole business of the bill chamber in time of session." To him all remits by either division of the court of session to a lord ordinary, in matters relating to sequestration or bankruptcy, and in such other matters as to either division shall seem proper, are thenceforward to be made. But in all these cases, in order to keep the business of the two divisions separate and distinct, and to prevent questions originating in one division from being carried into the other—a circumstance which would occasion inextricable confusion, besides the greatest delay and expense—it is enacted, that "where any application in the bill chamber shall be made to the said last appointed or junior ordinary judge of the first division, the party complaining, or making the application, shall notify to such judge the division of the court to which such application shall be understood to belong;" and it shall be "competent to either party, who shall be dissatisfied with any interlocutor pronounced by such lord ordinary, to reclaim to such division so notified; and, in cases of remits, it shall only be competent to reclaim to that division of the court by which the remit shall have been



made ;” “ and in cases where such last appointed or junior judge shall think fit to take any cause to report, such report shall be made to the division or court to which, in the event of reclaiming, the party or parties, is or are hereafter directed and appointed to reclaim.”

The other four junior judges are appointed to officiate as permanent lords ordinary, “ for hearing and determining causes in the rolls of suspensions, advocations, regulations, and ordinary actions ;” they are to “ sit in the outer house weekly by rotation, in such manner as that a judge or ordinary of the first division shall officiate the first week, a judge or ordinary of the second division the second week, a judge or ordinary of the first division the third week, and a judge or ordinary of the second division the fourth week ; and so alternately thereafter a judge of the one division following a judge of the other, as ordinary in the outer house.”

All these junior judges, as well as the lord ordinary on the bills, as the four permanent outer-house judges, are appointed to sit and officiate in their respective departments, “ according to the rules and forms of proceeding at present established, or which shall be established, by any act or acts of sederunt of the whole court of session, or a quorum thereof.”

The act of which we have now given an account, contains, besides ample provisions against any inconvenience that might arise from the death, resignation, or absence of any of the judges ; it regulates the manner in which the processes pending before any of the lords ordinary, under the old system, should be brought to a conclusion ; it also points out the remedy, where either of the divisions may happen to be reduced to a number less than the quorum ; and lays down a fixed rule of proceeding in cases where the voices in either division are equal.

Such, then, is the history of the court of session, which has, since its original institution, undergone such numerous and fundamental alterations, that it can hardly be now recognized as the same institution. It may, however, with great safety be averred, that most of the alterations have been decidedly improvements, especially those of a later date.\*

**JURISDICTION OF THE COURT OF SESSION.**—The court of session, as originally instituted by king James I., in the year 1425, was vested with a jurisdiction in all cases which had formerly been competent before the king and his council. It appears, however, never to have had cognizance in any question concerning fee or heritage. Its authority in these cases was expressly excluded by act of parliament,† and its judicial powers confined almost entirely to cases of obligation, contract, and debt. In matters of heritage the *daily council* was not more enlarged. According to our best authorities, this court continued to exercise the same limited jurisdiction with the *session* which had preceded it. The act which in-

\* Ivory's Forms of Process.

† 1457, c. 60.

stituted the *daily council* assigns it a jurisdiction in all civil causes and complaints daily, as they shall happen to occur.\* But we have the authority of Erskine for stating, that this did not extend to questions regarding heritage, which at that time seem to have been competent only before the justiciar. "The civil jurisdiction vested in it was extremely limited, and it was perhaps considered as too heavy a burthen for the justiciar of Scotland to be charged with the supreme jurisdiction, not only in criminal but in all civil matters concerning heritable rights." And Mr Hume, an author of considerable weight, in his learned work, says, "the commissions of these judicatures, (the session and daily council,) besides being imperfect and ineffectual in other respects, were very limited as to the description of causes which they included; and, in particular, that they did not attribute to the new judges the cognizance of *any claim or matter of heritable right*."† Neither court possessed any considerable powers of review over the decisions of inferior judicatories. On the contrary, both of them seem, in most respects, to have enjoyed only a cumulative jurisdiction with the judges ordinary.

The court of session, when reformed by James V., received a jurisdiction much more extensive than had belonged to either of the prior institutions. The same extensive jurisdiction still remains with it under its present form.

Its judicial authority, in one or other of its capacities, either as a court of the first or second instance, is universal in civil matters; and in a few instances extends even to cases which, at first sight, might appear to belong more peculiarly to the criminal court. As a court of the first instance, it enjoys both an exclusive and cumulative jurisdiction; and, with the exceptions immediately to be noticed, it is, under one or other of these jurisdictions, entitled to judge primarily in all civil cases. Where the action is one of uncommon importance or intricacy, the lords of session exercise a peculiar jurisdiction, to the exclusion of all inferior judges. Among actions of this nature, says Erskine, are to be considered "declarators of property in heritage, and other competitions of heritable rights; restitutions of minors; provings of the tenour; *cessionones bonorum*; reductions of decrees and deeds, and all other rescissory actions, judicial sales of the estates of minors and bankrupts, &c."

In the other civil causes which it is entitled to decide in the first instance, this court only possesses a cumulative jurisdiction with the judge ordinary. But there is a considerable set of actions which do not fall under the jurisdiction of the court of session, as a court of original resort; but must, in the first instance, pass through some of the inferior courts. Some of the most important of these are: 1. Causes proceeding on *briefes*

1503, c. 58.

† Trial of Crimes, vol. i. p. 6.

issued forth of chancery ; such as brieves for serving of heirs, or tutors of law, or relicts to terces, brieves of idiotcy for cognoscing furiosity or fatuity, &c.\* The reason is, that these brieves can only be directed to, and served by, the inferior judges. 2. Maritime and consistorial causes; these being competent, in the first instance, only in the courts of the admiral and commissary. 3. All causes not exceeding the value of £25 sterling, which must be carried on, in the first instance, before the inferior judges, in the manner directed, and with the exceptions specified in the act of Charles II., entitled “an act concerning the regulation of the judicatories.”† Besides these, there are several other cases in which the primary jurisdiction of the court of session is expressly excluded by statute. Such are the causes proper to the court of freeholders, to the lord lyon court, &c. As a court of review, its jurisdiction is even still more unlimited than as a court of the first instance. In this character the sentences of almost every inferior court may be brought before them, either by way of advocacy, suspension, or reduction. There are, indeed, a very few cases withdrawn by special statute from the operation of this power of review, but the number is extremely circumscribed. Formerly, even the interlocutory judgments of the inferior courts might have been submitted by advocacy to the review of the lords of session ; but this was a source of the greatest delay and expense, and the evil was very properly remedied in a late act of parliament,‡ which, among other alterations with respect to the form of procedure before the court of session, declared “that no action can be removed from the inferior court, before which it originated, till final judgment shall have been pronounced ;” except on one or other certain specified grounds. 1. “Incompetency, including defect of jurisdiction, personal objection to the judgment, and privilege of party. 2. Contingency. 3. Legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for partial payment ; provided that, in the cases under this third head, leave is given by the inferior judges.” There is another limitation of this power of review in cases of advocacy.§ By the act of Charles II. the lords of session are expressly discharged from granting letters of advocacy in any action for sums below 200 merks, (£11, 2s. 2½d. sterling,) “intended or to be intended before any competent inferior judicatory.” This limitation has since been extended to actions for sums below £12.|| Besides the authority which the court of session thus possesses over the sentences of inferior judicatories, it exercises also, in several cases, a power of reconsidering, on special grounds, the judgments pronounced by itself. In consequence of this, it may reverse “not only in-

\* Stair, book iv.

§ 1663, c. 9.

† 1672, c. 16.

‡ 50 Geo. III., c. 112.

§ 20 Geo. II., c. 43.

terlocutory sentences, upon a reclaiming bill by the party aggrieved, but definitive (after sentence pronounced and even extracted) by way of suspension or reduction.”\* Till very lately, however, when any interlocutor of a lord ordinary had, through inadvertency, been allowed to become final, it was incompetent for the inner house to review it upon petition. From this incompetency, unavoidable indeed in principle, serious inconvenience was found to result. A late statute, therefore, provided a remedy.† “That if the reclaiming or representing days against an interlocutor of a lord ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the lord ordinary,” to submit the interlocutor to the review of the inner house, by petition; but the petitioner must pay the expenses previously incurred by the other party.

The criminal matters in which this court possesses a jurisdiction are not numerous; and are chiefly limited to cases which, on account of the mode of procedure requisite to be followed, or their connexion with some civil suit previously in dependence, fall more regularly to be discussed in the civil than in the criminal court. Mr Erskine classes them under three heads: 1. When the case is made competent before the session by express statute; as in contraventions of law-burrows; in deforcement and breach of arrestment; fraudulent bankruptcy; wrongous imprisonment, &c. 2. Where the crime is necessarily connected with a civil question depending in court; as in the crimes of falsehood or usury, when either of these is made the ground of an action of reduction. In the crime of forgery, the court of session has sometimes even an exclusive jurisdiction; as, when the summary proceedings of the justiciary are inconsistent with the evidence to be adduced. 3. Where the action, though founded on criminal facts, is pursued only *ad civilem effectum*; as in actions of scandal or verbal injury, where damages to the private party only are claimed; in battery *pendente lite*,‡ when urged to the effect only of making the aggressor lose his cause. This last class of causes, however, seem more strictly to belong to the proper civil jurisdiction of the court; for notwithstanding the action *ad civilem effectum*, the criminal court may also interpose *ad vindictam publicam*. It may here be remarked in passing, that in all criminal cases competent before the court of session, they can inflict only the lighter degrees of corporal punishment. If the crime demand the higher penalties of death or demembration, the case must be remitted to the justiciary, as the only competent judicature. Before the union of the two kingdoms, the jurisdiction of the court of session was supreme in degree, as it was universal in extent; for though it has, no doubt, been maintained that even before that event its decrees were subject to the review of the parliament of Scotland, the assertion does not appear to be

\* Erskine, book i.

† 48 Geo. III., c. 151.

‡ 1594, c. 219.

borne out by any satisfactory evidence. Stair warmly espoused the supremacy of the court ; and his argument, founded directly on acts of parliament, is really unanswerable. Bankton decidedly lays down the same opinion. And though Erskine delivers his sentiments in more guarded language, he evidently leans to the same side. The question is now merely one of curiosity ; for it is agreed by all, that, since the union, the judgments of the court of session are subject to the review of the British house of peers. Though its jurisdiction is thus, in reality, no longer supreme, yet the court of session still retains, in general, the title which custom had stamped upon it—of the supreme civil judicature of Scotland ; but the fastidious acknowledge it only under the appellation of *one of the superior courts*.

The lords of session act not only as a court of law, but also, *ex nobili officio*, as a court of equity. Some of our most eminent authorities have supposed this *nobile officium* to be inherent in the supreme judicature of every state, and as such of course in our court of session. But it does not seem necessary to lay down a position so general. A more natural explanation of the power assumed by the court under this imposing title, may perhaps be founded on the statute\* authorizing the lords “ to mak sic acts, statutes, and ordinances, as they sall think expedient for ordouring of process and haistie expedition of justice.” Under this statute, the court has been led by gradual steps to assume an authority, which it is likely was neither originally inherent in it, nor even perhaps intended ever to belong to it. In consequence, however, of the benefit arising from the moderate and judicious manner in which this usurped power has ever been exercised, it was probably so long overlooked by those who might have checked it, that at last it has become so sanctioned by usage, as almost to be considered as a necessary branch of the constitution of the court. Whatever was the origin of this *nobile officium*, as it is called, or on whatever authority it rests, in virtue of it the court have always considered themselves as entitled to interpose when necessary, in abating the rigour of the common law, interpreting and modifying it often according to the more delicate and gentle maxims of equity. They also frequently supply defects in the ordinary forms of diligence, and interpose in a variety of other points, necessary for the public good. Under this *nobile officium*, likewise, may be classed the ministerial powers exercised by the court, in virtue of which, upon any vacancy occurring in the offices of commissariats, sheriffships, &c., by the death or incapacity of the former incumbents, they appoint certain persons to officiate in the interim, under their special commission, until the vacancy be regularly supplied in the proper course.

\* 1540, c. 93.

It has already been observed, that this court by its institution, was empowered to lay down such regulations for the form of its own proceedings, as should appear best calculated for the speedy promotion of justice. This original power was ratified by a statute\* in rather more broad and comprehensive terms. The court was pleased to give this power a pretty comprehensive interpretation; and many of their ordinances came in course of time to involve matters of right, which had not the smallest connexion with the rules of judicial procedure. In consequence of the universal acquiescence with which they were received, some of these have become part of the common law, without any aid from parliamentary authority; while others, being expressly ratified by the legislature, have found their way into the statute law. As to that portion of these ordinances which still remains unratified, it may generally be laid down, that so far as they regard only the forms of procedure before the court, they have of themselves all the authority of acts of parliament; but in so far as they exceed this their proper province, and intrude upon other matters, they are chiefly to be considered as a public notification of what the judges apprehend to be the law of Scotland, and of what, as such, they are determined to observe for the future, as rules of judgment.†

**MEMBERS OF THE COLLEGE OF JUSTICE.**—It is not now very easy to decide who were the original members of the college of justice. Their number has been considerably increased since its original institution by James V.; and it is a fact which does not admit of dispute, that this increase has been entirely owing to custom, and not to legislative enactments. At its first establishment, from the terms of the act of institution it may be conjectured, that the only persons then ranked among its members were the judges or senators (as they were then called) of which the court was composed, and to them *alone* were the privileges granted. And though advocates, writers to the signet, clerks of court, &c., are repeatedly mentioned, yet not one sentence is to be met with which could justify the supposition, that they were likewise included under the appellation of the college of justice. No contradiction is furnished to this conjecture by the early ratifications of the institution. For the manner in which the college is spoken of in these acts, is so vague, that it is impossible to draw any inference from them, either as to the number or the privileges of its members. In the course of time, other classes of persons than mere judges claimed to be included in the privileged class, and their claims were duly allowed. So early\* as the year 1555, the lords of council and session, taking various circumstances into consideration, for which, to quote their own words,‡ “*thae suld be preferrit the uthers prelati* of

\* 1540, c. 93.

† Ivory's Forms of Process.

‡ Act of Sederunt, May 11, 1555.

the realme, *according to the institution of the college of justice*, and sould half haistie expeditioun of their causis in the Setterday's table; therefor, hes statute and ordainit, that in all tymes cuming, there be ane table made separetelie be itself, for *all the lords of session, their scribis, advocatis, and members of court.*" An act of parliament, passed a few months afterwards, conferred a much more valuable privilege on the same classes of persons mentioned in the above act of sederunt. It declares "that na advocation of causes be taken be the lords fra the judge ordinar, except it be, &c., the causes of *the lords of council, and their advocates, scribes, and members.*"\* From the concurrent testimony, therefore, of these two documents, it may be fairly laid down that in the year 1555 at least, if not before, the advocates, scribes, and some other members of court, had begun to be classed along with the lords of session as members of the college of justice. They are not, indeed, expressly recognized as possessing that character either in the act of sederunt, or the act of parliament; but, from the reasons assigned in the former for conferring this privilege, and its striking coincidence, both in language and purpose, with the latter, it is evident that if the privilege was not then conferred upon them precisely as members themselves, it must at least have been so on account of some intimate connexion supposed to exist between them and another class of persons, who, out of all dispute, were allowed to be members of the college. This latter supposition is perhaps the more probable of the two, and the connexion between the classes of privileged persons is sufficiently intimate, not only to account for their being included under similar privileges, but still farther for their being ultimately recognized under the same appellation, and acknowledged as members of the same body. But if the connexion between the senators of the college of justice and the various members of court was so intimate in the year 1555, as to produce the effects stated, it is not wonderful that the very effects thus produced were, in their turn, the causes of effects still more extensive. The privileged classes were now more closely linked together, and more nearly assimilated by the very privileges which they enjoyed in common. They were formerly connected in their professional pursuits, and now one common interest still more attached and united them. The members of court had long been ranked by the public as subordinate members of the same institution whose senators had been erected into a college. The legislature had begun by conferring the same common privileges upon all; and, following the universally received language of common conversation, they soon ended in *recognizing* them under the same common appellation. Accordingly, the very next acts of parliament, which mention the college

\* 1555, c. 39.

of justice, describe it in such a manner as evidently implies that its members were not limited to the judges that sat on the bench. The act, in particular, of 1594,\* expressly mentions "the lords of the session, ordinar, or extraordinary, advocates, clerks, writers, their servandes, or *ony uther* member of the colledge of justice." But though, from the above enumeration, it was no longer so doubtful a matter as formerly, who were the members of the college of justice, still the point was not just altogether settled. The ambiguous words, *ony uther member*, still remained to be cleared. And it was not till the year 1697, that any thing farther was done towards obviating this difficulty. A dispute having then occurred between the college and the magistrates of Edinburgh, respecting the number of privileged persons, an act of declarator was raised by the former, which produced a long and spirited discussion; and a judgment was eventually pronounced which removed every shadow of doubt. The judgment is recorded in the books of sederunt, and its authority never having been called in question, it has long been considered as part of the common law.

The following persons are declared, by this important judgment, to be the privileged members of this very numerous college :—

- The lords of session ;
- Advocates ;
- Clerks of session ;
- Clerks of the bills ;
- Writers to the signet ;
- Deputies of the clerks of session, who serve in the outer house ; and
- Their substitutes for registrations, being one in each clerk's office ;
- The three deputies of the clerks of bills ;
- The clerks of exchequer ;
- The directors of the chancery ; their depute ; and two clerks thereof ;
- The writer to the privy seal ; and his depute ;
- The clerks of general registers of seisins and hornings ;
- The macers of the session ;
- The keeper of the minute book ;
- The keeper of the rolls of the inner and outer house.

But comprehensive as this list is, the privileges are not confined solely to them ; the following personages are included :—

- One actual servant of each lord of the session ;
- One servant of each advocate ;
- Four extractors in each of the three clerks' offices of the session ;
- Two servants employed by the clerk of the register in keeping the public registers ; and

\* c. 20.



The librarian of the advocates' library.

And by the act of queen Anne,\* the privileges have been farther extended to

The barons, and *other* members of the Scots court of exchequer.†

**THE LORDS OF SESSION.**—It has been already observed, that the fifteen ordinary lords who compose the court of session are now distributed into two divisions, forming two separate and distinct courts. On its first institution, it was a fundamental part of its constitution, that one-half of the judges should be prelates, the other laymen. But this fundamental principle was gradually altered, and one of the articles in the treaty of union has rendered it impossible for any churchman, at least as such, to sit on the bench in the character of a judge. The 19th art. of Union declares, that no person can be eligible to the situation of a judge, except he has served in the college of justice as an advocate or principal clerk of session for five years, or as a writer to the signet for ten years. On their appointment to the bench, the judges generally take a title from their estates; but sometimes they retain their own surnames: the lord president and lord justice clerk are always designated by their offices. The two latter also, from their superior dignity, have of course the precedence of the others; the only distinction between the other judges, with respect to each other, arises from the priority of their admissions. It is agreeably to these rules of precedence, and not from any regard to title, birth, or office in the state, that the lords of session take their places on the bench. When once appointed, the judges continue throughout all their different departments, to officiate in the same division to which they were first nominated. The junior judge of the first division, who officiates in the bill-chamber for both divisions, is promoted, on the occurrence of a vacancy in his division, to the outer house, and from thence in process of time he is translated to the corresponding chamber in the inner house. The steps are exactly similar by which the outer house ordinaries of the second division reach the inner house, with this exception, that they are never called on to officiate in the bill-chamber.‡

**THE ADVOCATES.**—Judge Bankton was of opinion, “that of old we had no advocates licensed by public authority.” On the institution of the college of justice, however, a certain number of persons were authorized by special statute to practise before the court. But the business of the court, and the endowments of the lawyers, in those days, must have been extremely limited, since the number of advocates was expressly restricted to ten; and even that number, small as it now appears, it was found

\* 6 Anne, c. 26.

† Ivory's Forms of Process. Beveridge's do

‡ Ivory's Forms of Process. Beveridge's do.

impossible, at the date of the statute, to fill up with persons properly qualified for the office. This statutory restriction does not seem, however, to have remained long in force. The number of advocates soon increased, and the roll of the faculty contains at present upwards of three hundred names.

At first there does not appear to have been any peculiar form necessary for the admission of an advocate; the only requisite then was, that he should be a man "of best name, knowledge, and experience, and be received with advice of the lords." So late as the middle of the sixteenth century, advocates were received by the court without almost any examination. Gentlemen training for the bar, used merely to attend the lawyers in practice for a year or two in the capacity of their first servants or clerks, which was synonymous with the agents of the present day. And when in this employment they had acquired some slight experience in the management of processes, they applied to the court, setting forth their services, and, on producing *certificates* of their *honesty* and *abilities*, were immediately admitted. Afterwards, however, none were admitted "but such as had spent many years in the study of the laws, either at home or abroad;"\* and were, upon trial, found qualified either in the civil law, or in the municipal laws of Scotland. The ordinary, and, strange as it may seem, the most honourable course of entry, was by an examination on the civil law; for conducting which, certain regulations were laid down, and examinations appointed by the faculty of advocates, under the sanction of the court. But if the intrant preferred to be passed on a trial of his proficiency in the municipal laws of his own country, he was admitted by the lords themselves after an examination *in præsentia*; but this was styled the extraordinary form of admission, and for which double fees were paid. The present form of admission is regulated by act of sederunt.† There is now no alternative course to be pursued; "a proficiency not only in the civil law, but also in the municipal law and practice of Scotland," being declared indispensable. The intrant must present a petition to the court, stating his desire to be entered an advocate, and his readiness to undergo the customary trial. The court remits him to the dean of faculty, and he again to private examiners. On satisfying them that he has attained the age of twenty years complete, they proceed to examine him on the civil law. If they find him qualified on this trial, they report him to the dean and faculty; and on the expiration of one whole year, but not sooner, he is then examined on the municipal law. The intrant having acquitted himself in this also to their satisfaction, they recommend him to the dean, who assigns him some title in the civil law for his public trial. Upon this title he is ordered to compose a thesis, which he must defend publicly. The dean then assigns

\* Spottiswood's *Forms of Process*, pp. 50 and 43.

† 28th February, 1750.

a law in the title for his exercise before the lords ; and the whole ceremony concludes with a *learned discourse*, which he delivers on an appointed day before the judges of the first division, immediately after the meeting of the court. He then takes the usual oaths.

That of an advocate is a most honourable profession. Peers' eldest sons have been known to practise without the smallest disparagement to their birth ; and so ambitious are some of obtaining the title, that they go through the whole course of preparatory study without any intention of practising at the bar. It is from the class of advocates alone that the sheriff-deputies of counties can be appointed ; and from them also the judges of the different superior courts are almost exclusively nominated. Though admitted only by the lords of session, advocates are entitled, without any farther trial, to plead and practise before any court in Scotland, whether superior or inferior, civil or criminal, and likewise before the high court of parliament. They make no scruple to appear, upon occasions, before the high court of admiralty, or commissaries of Edinburgh, these being, in a certain sense, superior courts ; but they consider it derogatory to plead before any inferior court, except in important cases, or upon extraordinary occasions. In the court of session it is their exclusive privilege to plead all causes whatever. The court formerly conceded to the parties to plead their own causes, especially in cases where matters of fact were chiefly involved. But this was productive of so much trouble and inconvenience, that it was found necessary to prohibit the receiving of any paper, unless subscribed by an advocate. It is contended that this regulation cannot occasion any hardship ; for as the advocates are obliged "to procure for everie man, for their wages, bot gif they have reasonable excuse," no person need be in want of counsel if he can afford the necessary fees ; and, on the other hand, should he happen to be in indigent circumstances, a sufficient remedy is open to him in the poor's roll.\*

AGENTS BEFORE THE COURT.—At one time the privilege of agenting causes before the court of session belonged exclusively to the first clerks of advocates. By the act of parliament regulating the proceedings before the different judicatories, all persons taking on them the name of agents, being neither advocates nor servants, are "debarred the house, and not permitted to negotiate in, nor manage processes." This prohibition was farther enforced by an act of sederunt, discharging the clerks of session and their servants "to lend out to any persons any processes or wrytes produced therein, except only to advocates and their known servants." So long as the place of advocates' servants or clerks continued to be supplied by young gentlemen who were studying for the bar, this system of things was well calculated for the proper management of business. In every point the clerk acted under the immediate eye of his

\* Ivory's Forms of Process.

master, and enjoyed the benefit of his counsel and advice. The station, too, which he was ultimately destined to fill in society, insured a degree of respectability to the business of agenting, which afforded the public every security of being faithfully served. But when, in the course of time, this practice ceased, and an advocate's clerk came to be little better than a copying machine, the same reason no longer operated for restricting the business of an agent to this class of persons. By a code of laws laid down by the secretary of state for the conduct of writers to the signet, they had been expressly prohibited from officiating as agents so early as the year 1594. But after repeated attempts to break through this restraint, they at last succeeded; and the encroachment made on the privileges of advocates' clerks, by a body of men so well qualified for the duties of agents, was advantageous to the public. Their success emboldened others who were not so well qualified for the business, and which produced inconveniences that obliged the court to interfere for their remedy. Accordingly, an act of sederunt in August, 1754, ordained "that no person, except clerks to his majesty's signet, and clerks to an advocate," should be permitted to act as agents, unless enrolled as a solicitor. There were thus three distinct sets of persons entitled to practise as agents before the court—writers to the signet—agents or solicitors—and advocates' first clerks.

With regard to the business of an agent, it is, as it always has been, to collect the necessary information for conducting the process—to embody that information into a state or memorial of the case—and to lay it before the advocate who is to plead the cause. He attends, besides, to the whole *minutiae* of procedure in the court; bringing on the action at the proper time, making the necessary enrolments, attending to reclaiming days, &c.; and, in short, is continually on the alert wherever there is the slightest possibility that his client's interests may be affected in the remotest degree.\*

WRITERS TO THE SIGNET—or, more properly, clerks to the signet—were anciently clerks in the office of the secretary of state, by whom writs passing the king's signet or great seal were prepared. When the forms of judicial procedure were changed, in consequence of the introduction of clerical judges into the administration of justice, and the briefs of the old law, with jury trial, fell into disuse, the king's signet was open to the writs or summonses ordering attendance on the king's court, or to the diligence necessary for giving effect to its decrees. The new writs, which in this manner became requisite, were prepared by the writers to the signet; in consequence of which, their numbers must have considerably increased as the new system of writs extended. At the time of the establishment of the college of justice, the writers to the signet were in the exercise of the same duties in which they are engaged at the present day; and they are recognized as constituent parts of that comprehensive college.

\* Ivory's Forms of Process.

The duty of writers to the signet is to prepare the warrants of all charters of lands flowing from the crown; all summonses for citing parties to appear in the court of session; all diligences of the law for affecting the person or estate of a debtor, or for compelling implement of the decrees of the supreme court. They have further the privilege of acting as agents or attorneys in conducting causes before the court of session. After ten years' service, and certain probationary examinations on civil law, they may be appointed judges of the court of session. They are also eligible to several other important offices connected with the court of session, and they are the only persons entitled to act as clerks to services before the sheriff of Edinburgh on special commission—a privilege which they formerly possessed in services before the macers—but which are now abolished.

The society is now under the keeper of his majesty's signet, who usually acts by a deputy keeper; and the affairs of the body are conducted by his deputy and certain commissioners named by the keeper, from the members, with power to them to make bye-laws for the admission of members, and the regulation of their conduct. By the bye-laws at present in force, a person, before applying to be taken on indenture by a writer to the signet, must be at least fifteen years of age, and must have attended one of the universities for two years, of which evidence must be produced along with his petition. The indenture continues for five years; the *maximum* apprentice fee is £210, besides which there are paid £20 to the widow's fund, £50 to the library, and other smaller fees. One year must intervene, after the expiry of the indenture, before he can be admitted as a member of the society; and he must have attended three classes of law, independently of his previous attendance at the university for two years. The candidate being admitted to his trials, is first examined on his knowledge of Scots law by three private examiners; and, at the distance of three months, he is examined in the society's hall by the public examiners, in the presence of the commissioners, as to his knowledge of conveyancing. The dues of his admission are about £50, with some trifling perquisites to the officers and gown-keepers, besides a stamp on the commission.\*

**SOLICITORS.**—By a crown charter, which the solicitors obtained in the year 1795, they are now entered into a body corporate, by the name of “the society of solicitors before the court of session, high court of judiciary, and commission of tiends.” No person can be admitted into this society till he has first served as clerk or apprentice either to a solicitor or writer to the signet for the space of five years, or acted in the capacity of advocate's *second* clerk for the same length of time. After this, if he has attained the age of twenty-one years complete, be of good moral character, and properly qualified for the duties of the office, he is reported to the

\* Bell's Dictionary of the Law of Scotland.

court by certain examiners appointed for that purpose ; and, on taking the usual oaths, his name is “ entered in the sederunt book.”\*

**CLERKS OF SESSION AND OTHER OFFICERS OF COURT.**—There are six principal clerks of session, and six assistant clerks or closet-keepers, as they are sometimes called. They are appointed by the king, and admitted by the lords, after a probationary trial, and they must be either advocates or writers to the signet of three years’ standing; this appointment disqualifies them from practising as advocates or agents before the court of session. Their duty is to attend the judges in the inner house, and, under their direction, to write out the judgments or interlocutors, or other orders pronounced by the court, and to keep the books of sederunt. Three of the principal clerks attend each division of the court. The depute clerks officiate in the outer house before the lords ordinary, whose judgments or interlocutors they write out. The six principal clerks nominate their deputies jointly, the senior clerk having the casting vote in case of equality. Each principal, and each depute clerk, has a distinct apartment or closet, as it is called, in the register office, in which he keeps the processes to which he is clerk. The duty of taking charge of the outer house processes, of transmitting to the judges for consideration, and of attending at the closets of the depute clerks to lend out the processes to the agents for the parties, is discharged by the six assistant clerks or closet-keepers, who also attend in the outer house while the court is sitting, and assist the depute clerks in writing out the interlocutors of the different lords ordinary. The principal clerks have also assistants, who officiate at their apartments in the register office, and take charge of the processes depending before the inner house. Neither the principal nor depute clerks are entitled to fees, but they have fixed salaries; the former £1000 per annum each, and the latter £400. The assistants’ emoluments are derived from small fees which they exact for lending out and receiving back processes, for lodging papers, &c.†

The keeper of the minute book holds his commission from the king. His duty is to make up a short minute of the different protestations, acts, and decrees pronounced in court, distinctly noticing the names and designations of the parties. The minute book was ordered to be printed by act of sederunt.

There are three keepers of the rolls; one for each division of the inner house, and one for the outer. Before the court was divided, there was only one keeper of the rolls for the inner house; whose office at one time was in the appointment of the chancellor of Scotland. After the union, this office was bestowed “ on the person serving the lord president, for the time being, as his clerk.” Clerks to the presidents of each division

\* Ivory’s Forms of Process.

† Bell’s Law Dictionary.

are still respectively keepers of the rolls of their several divisions, so long only as they shall continue as clerks to the presidents. The keeper of the outer house rolls is appointed by the lords of session. His commission is usually granted *ad vitam aut culpam*; one solitary instance only having occurred of an appointment during pleasure.

AUDITOR OF THE COURT OF SESSION, is an officer appointed by the crown, to whom either of the divisions, or any lord ordinary, may remit to tax the costs of a suit in which expenses are found due. A special remit of the particular account to be taxed is necessary; and the auditor returns a report to the judge or court making the remit, who thereupon pronounces decree for the amount of the taxed account. If either party considers himself aggrieved by the auditor's report, it is competent for him to state his objections to the court or judge, by whom they will be summarily and finally disposed of. This office is one of very recent institution; the first appointment was on 6th February, 1806; his fees are settled by act of parliament. Ivory says "his appointment seems to be vested in the court." Bell says "the nomination is vested in the crown," and is held *ad vitam aut culpam*.\*

COLLECTOR OF THE FEE FUND, is an officer still more recently appointed. His province is chiefly to collect the dues of court, as fixed by act of parliament; to keep regular and distinct books of his receipts, and to lodge the amount regularly, at least once a-week, either in the bank of Scotland, or royal bank of Scotland. He is appointed by the lord president, holds his office *ad vitam aut culpam*, and receives as a remuneration for his trouble four per cent. on the dues received by him. The money thus levied constitutes what the act calls a fee fund, and it is from this fund that the salaries of the different officers of court are mostly paid.

MACERS, are the proper servants in the court of session. They are four in number; three of whom are nominated by the crown, and the other by the family of Moncrief of Readie, who have long held the office of hereditary macer before the lords of session, and have always been allowed to fill it by deputy. The macers are supreme judges in the service of all briefs from chancery: but in cases of the smallest intricacy, the judges appoint one of their own number to sit with them as assessors. It is more particularly their business to call the causes pending before the court, in the course of the different rolls; to put the immediate orders of the lords in execution, and keep order in the court.

The two keepers of the parliament house are appointed by the lords of session and the magistrates of Edinburgh alternately. The mode of their

\* Bell's Dictionary—Ivory's Forms.

appointment was settled by contract between these parties, and is particularly noticed in the books of sederunt.\*

**PRIVILEGES OF THE COLLEGE OF JUSTICE.**—It has already been observed, that whatever may originally have been the extent of the college of justice, its privileges were conferred on the judges alone. These privileges were valuable in the highest degree, exempting them “fra all paying of taxes, contributions, and uthar extraordinare chairges, to be uplifted in ony times cumming, and fra the bearing of ony office or chairge within burgh, or without, but gif it be their awin free will and consent.”† These were repeatedly ratified by act of parliament, and their number increased by the addition of others little inferior in importance to those originally conferred. Nor were the other branches of the college of justice long excluded from participating in some measure with the lords in the enjoyment of these privileges. For instance, the exemption from the inferior courts was granted not only to the lords of counsel, but also to their advocates, scribes, and members: besides several exemptions no less extensive in their application. It was not, however, till the reign of Charles II. “that the *whole* privileges, liberties, and immunities granted and belonging to the ordinary lords and senators of the college of justice” were extended to the “advocates, clerks, writers to the signet, and remanent members of the said college.”

This act having so considerably enlarged the number of the privileged class, it became in proportion an object of interest to ascertain what the privileges actually were to which they were entitled. The college accordingly seized the opportunity of a dispute between that body and the corporation of Edinburgh, with regard to the liability of the former to pay some of the town dues, to settle the question for ever in their own favour. An action of declarator at the instance of the college was raised and tried of course before themselves, when, as might be expected of judges deciding their own cause, they pronounced a judgment, which, besides establishing decidedly who were the privileged persons, also finally and peremptorily settled what those privileges were: viz. the members of the college are exempted from watching and warding; from payment of tithes, or as it is called, annuity for ministers’ stipends; from *all the city imposts* on goods carried to or from the city; and from the civil jurisdiction of the magistrates.

The last exemption extends likewise to all inferior jurisdictions. But in the case of the city of Edinburgh, the peculiarity is, that the magistrates must at once sustain the declinature of their jurisdiction “without obliging the party to raise an advocacy, which is the method with

\* Ivory’s Forms of Process. Beveridge’s do. Bell’s Dict.

† Act 1537, c. 68.



respect to others.”\* It may be proper to mention another privilege which they possess, which is, that when any tax or cess is imposed, to which by act of parliament the privileged class are subjected, the court have the right of nominating certain members of the faculty of advocates and of the society of writers to the signet, to meet with the stent masters appointed by the magistrates, who take care that the privileged class shall not be burdened beyond their just proportions.

More than a century elapsed before the magistrates of Edinburgh had the courage to question the privileges of the college: but a poor's rate having been projected, and an attempt also made to subject the privileged to a proportional share of its burden along with the other inhabitants, another question of liability arose, which being tried before the privileged court, was of course decided in their own favour.† The whole privileges enjoyed by the college were ratified by the treaty of Union; but modern acts of parliament have not always been so tender of their privileges as their own acts of sederunt; and Mr Ivory says, “that their value has at last become more nominal than real.”‡

**HIGH COURT OF JUSTICIARY.**—This court is composed of five of the lords of session added to the lord justice-general and justice-clerk, of whom the former, and in his absence, the lord justice-clerk, is the president. The constitution of this court was settled by the act 1672, c. 16. At first the judges were named for life, but afterwards they seem to have been removable at the pleasure of the crown; but the claim of right asserted “that the changing the nature of the judges’ gifts, *ad vitam aut culpam*, into commissions *durante bene placito*, is contrary to law;” and by the commission in 1690, the crown did not reserve any such power. The quorum of this court consists of three judges; and no appeal lies from its decisions, whether interlocutory or final, to the house of lords or any other court.

The court of justiciary had anciently justice ayres or circuits, for distributing justice in different parts of the kingdom, but these have fallen into disuse; and in 1748,§ it was enacted that circuit courts should be held regularly twice a-year, on which footing they continued till the year 1828, when an act of parliament ordered “an additional circuit court to be held at Glasgow, for trying criminal causes during the recess of the court of session in the end of December and beginning of January yearly.”|| The act of 1672, divides the kingdom into three districts: the circuit courts of the southern district are directed to be held at Jedburgh, Dumfries, and Ayr: the western at Stirling, Inverary, and Glasgow; and the northern at Perth, Aberdeen, and Inverness. The court must remain

\* Bankton, B. IV.

§ 20 Geo. II. c. 43.

† Morrison's Dict.

|| 9 Geo. IV. c. 29.

‡ Ivory's Forms of Process.

at each place not less than three days ; and no business begun at either of the places must be left unfinished. The spring circuit must be held between the 12th March and the 12th May, and the autumnal in the time of harvest. One judge may proceed to business in the absence of his colleague, and when necessary, the circuit court may certify a case commenced before it to the whole court of justiciary for consideration. With regard to presentments and informations in order for trial before the circuit courts, it is enacted,\* that the sheriffs, magistrates of burghs, justices of the peace, and other inferior judges, shall hold courts at their usual places of sitting, on the 22d February and 22d July, yearly, to receive information of criminal matters to be tried at the ensuing circuit, and to transmit written abstracts of the accusations offered before them, and the evidence by which they are supported, to the lord advocate, and his deputies, forty days at least before the sittings of the respective circuit courts, so that indictments may be raised in due time. This duty has, however, in practice devolved on the sheriff, who is bound to make immediate inquiry into the circumstances of every crime committed within his sheriffdom, as soon as his fiscal or the injured party shall lay a complaint before him, so that in general the offender is in custody or under bail, and the precognition duly transmitted to the lord advocate, before the days mentioned in the statute.† The jurisdiction act allows an appeal to be taken to the circuit court of justiciary : 1st, In criminal cases, against the judgment of an inferior judge, inferring neither death nor demembration ; and 2d, in civil cases, when the subject does not exceed £12 sterling, (which is now extended to £25.)‡ These appeals must be lodged with the clerk of the inferior court within ten days after the judgment has been pronounced : and the adverse party, or his agent, and the inferior judge himself (where the appeal contains any conclusion against him), must be served with a copy of the appeal fifteen days at least before the sitting of the circuit court. But no such appeal is competent, except a final decree of the inferior court. The circuit judges must proceed in these causes summarily, and their decision is declared final. In difficult cases, however, they may report their proceedings to the court of session or of justiciary, as the cause happens to be civil or criminal. The jury court may hold sittings twice a-year, if necessary, at the different circuit towns where the circuit court of justiciary meets, twenty-one days' notice of such sittings being given by intimation on the walls of the outer parliament house, and in the lobby of the court of exchequer, and also on the door of the court-house of the circuit town,

\* 6 Anne, c. 16.

† 20 Geo. II., c. 43.

‡ 54 Geo. III., c. 67.

and the door of the sheriff's court, in the other county towns of the circuit.\*

**JURY COURT.**—This court was established in 1816, for the trial of civil causes by jury.† Mr Ivory asserts, that “trial by jury was at one time universally established in this country, and even prevailed in the courts of civil judicature.” “Our ancestors,” he continues, “probably received it at the same time, and from the same source, as their neighbours in England; and traces of it being to be found in the laws of all those nations which adopted the feudal system, as in Germany, France, Italy, it is not unlikely that all may have derived it from the same common origin.” It must however be extremely difficult, if not altogether impossible, to discover. It has been by some traced back to the classical times of the Greeks and Romans; and in the judicial institutions of both Athens and Rome, there is certainly a very strong analogy, if not absolutely a perfect similarity, to the jury of the present day. Dr Pettingal, whom Sir William Blackstone, a very competent judge, characterizes as a learned writer, has written an essay for the express purpose of establishing the classical origin of juries. And so many and powerful are the resemblances which he points out between them, the *δικασται* of the Greeks, and the *judices selecti* of the Romans, that one is almost tempted to acquiesce in his conclusions.

Among the Athenians there was the same relative connexion between the *Ἀρχων*, or presiding magistrate and the *Δικασται*, that at present subsists between our judges and jury. The *Δικασται* “were chosen out of all the different ranks of the people.” “In order to prevent all suspicion of corruption, they were chosen by lot. They tried all the principal causes, and the majority carried the question. They were increased in number, according to the importance of the cause. When they were impanelled, they were enclosed by a rope, to prevent all attempts of corruption. They were sworn on every cause to do justice, and determine according to law; and in matters before them, were allowed to follow their own knowledge of the fact, and not always to be guided by evidence.” “The verdict was taken by the *archon* or president of the court by ballot, and declared by him; after which they received their pay, because they consisted, for the most part, of the common people.”‡

In the Roman courts, the *prætor*, or *quæstor*, or *judex questionis*, (for all these names apply to the presiding magistrate under different circumstances) exercised judicial functions nearly analogous to the Athenian *archon*. The *judices selecti*, likewise, or *jurati homines*, seem to have possessed much in common with the *ἄνδρες δικασται*, “and were summoned by the *prætor* to give their verdict in criminal matters,

\* Bell's Law Dictionary. Hume's Commentary, vol. II. † Bell's Dict. ‡ Pettingal, p. 69.

in the same manner as our juries.”\* They were first returned by the *prætor*; *de decuria senatoria conscribuntur*. Then their names were drawn by lot, till a certain number were completed: *in urnam sortito mittuntur, ut de pluribus necessarius numerus confici posset*. Then the parties were allowed their challenges; next they struck what in England is called a *tales*; and, lastly, the judges (*judices*), like our jury, were sworn.†

Judging from the strength of these analogies, and combining them at the same time with the other probabilities which are pointed out in Dr Pettingal's essay, the conclusion at which he arrives, must be acknowledged to be, at least, plausible, “that the *δικαστηριον* of the Greeks, the *judicium* of the Romans, and the *jury* of the Saxons and English, were in principle, intention, and effect, the same; and that the English *jury* was an imitation of the Roman *judicium*, brought into their northern conquests, as the *judicium* and *judices* of the Romans were a transcript of the *δικαστηριον*, or trial by jury among the Greeks.”

But there are writers, on the other hand, who reject this hypothesis; and who, deducing the trial by jury from the natural progression of the feudal system, maintain that there is good reason to believe that it arose from the general situation of the Gothic nations.‡ In support of their argument, these refer to the very early and universal establishment of this form of trial among all those northern nations where feudal manners were purest and most deeply rooted. Professor Millar of Glasgow, says, that “every feudal superior was the natural judge of his own tenants and vassals;” and so long, of course, “as his military retainers held their benefices precariously, and when the other members of his barony were either bondmen or merely tenants at will, he found himself under no restraint in deciding their differences, and in punishing their offences.” But in disputes among the superiors themselves, the rule of decision was extremely different. “There was here no single person possessed of sufficient authority to terminate the difference. The parties being independent of each other in point of property, and therefore masters of their own conduct, were under no necessity, in a matter of that kind, of submitting to the orders of any individual. They acted in the same manner with respect to the exercise of their civil rights, as with relation to peace and war. In both cases they considered themselves as free men, subject to no restraints but such as arose from the nature of their confederacy, or were imposed by their common consent.”|| In this situation, the establishment of tithings, hundreds, and shires which had primarily been intended for the mutual defence of the inhabitants, was likewise rendered subservient

\* Kennet's Rom. Ant. cited by Ivory.

‡ Millar's Historical View of the English Government.

† Blackstone.

|| Ibid. cited by Ivory.

towards composing the animosities and differences among their own members. "Roused by the danger of a quarrel which might be fatal to their union, and which might render them an easy prey to their neighbours, they readily interposed, with all their influence, to reconcile the parties, and to observe the rules of justice. A judicial power was thus gradually assumed, by every *tithing* over the allodial or independent proprietors of which it was composed. The *hundred*, in like manner, came to exercise a power of determining the differences between the members of the several tithings within the bounds of that larger district; as the meetings of the *shire* established a similar jurisdiction over the different hundreds comprehended in that extensive territory. It is probable that every kind of lawsuit was at first determined in full assembly, and by a plurality of voices; but in the larger meetings of the hundred and the shire, it would seem that when the authority of those tribunals had been confirmed by custom, and their duty had become somewhat burdensome by the increase of business, convenience introduced a practice of selecting a *certain number* of their members to assist their president in the determination of each particular cause. Hence the origin of juries."\* This appears to us to be purely hypothetical, and by no means clear. Hume, also, in his history of England, attempts to account for the origin of juries in a similar manner, but he attributes the whole system of tithings, hundreds, and shires to the inventive mind of the great Alfred; who, "that he might render the execution of justice strict and regular," he says, "divided all England into counties, these again he subdivided into hundreds, and the hundreds into tithings;" "nothing could be more popular and liberal than his plan for the administration of justice. The borsholder summoned together his whole decennary to assist him in deciding any lesser difference which occurred among the members of this small community. In affairs of greater moment, in appeals from the decennary, or in controversies arising between members of different decennaries, the cause was brought before the hundred, which consisted of ten decennaries, or a hundred families of freemen, and which was regularly assembled once in four weeks for the decision of causes: their method of decision deserves to be noticed, as *being the origin of juries*; an institution admirable in itself, and best calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man. Twelve freeholders were chosen, who having sworn together with the hundreder, or presiding magistrate of the division, to administer impartial justice, proceeded to the examination of that cause which was to be submitted to their jurisdiction."† But while it is thus attempted to account for the introduction of jury trials in all those disputes which occurred between allodial and independent pro-

\* Millar.

† Hume's England.

prietors, the same principle of explanation does not apply with reference to the disputes of their subordinate retainers. Another assumption, therefore, becomes necessary to render the *theory* complete, and the ingenious professor thus explains it: "In the progress of improvement," says he, "the advancement of the vassals and peasants to greater security and freedom, and the separation of the trading people from the class of husbandmen, could not fail to limit the authority of the superior, and more especially to affect the state of his jurisdiction. He was accordingly obliged to relax his claim to their obedience, and to distribute justice among them with greater moderation and circumspection. The retainers of every feudal superior were bound not only to the performance of military or other services, but also to assist him in maintaining good order and tranquillity within his barony; and, therefore, when any of them complained of injustice from another, or was accused of a crime, the baron found it expedient, instead of deciding by virtue of his own authority, to call a number of his other vassals, and to proceed with their advice and concurrence in trying the cause. This expedient was the most equitable for the person concerned in the trial, as well as the best calculated for giving weight to the decision. The assessors of the judges were the *pares curiæ*, men of the same rank with one another, and with the parties; they were chosen occasionally, and varied in each cause, to avoid burdening any individual more than his just proportion; and they were commonly selected from the neighbourhood of the place where the accusation or dispute had taken its rise, that from their private knowledge they might be enabled to form a better judgment of the facts in question.—Thus," concludes the professor, "the trial by inquest or jury, which had formerly taken place in the tribunals of the shire and of the hundred, was introduced into those of a *feudal* barony."\*

But from whatever source the trial by jury may have sprung, whether it originated with the Greeks, was copied by the Romans, and by them introduced into their province of Britain, and thence adopted by our ancestors, when the Romans abandoned the island, and which appears to us to be the most rational mode of accounting for it, or whether it was the natural offspring of the feudal system, there cannot be any doubt of its early existence throughout the whole of these islands. As to England, lord Somers has remarked, "of what date juries be, is the same as to say, when was England first inhabited—altogether uncertain. But that this antiquity here in England runs to and beyond the Norman conquest, among the Danes, the Saxons, and the Britons, is most certain."† In Scotland, again, as far back as the year 843, we find recorded among the laws of Kenneth Macalpin the following remarkable evidence of the use

\* Millar, vol. i. p. 327—329.

† A Guide to English Juries, 1682.

of jury trial even at that time: "*Capitalium insimulatos septem spectata fide viri, aut novem, undecim, tredecim, quindecim, aut numero majori, modo is impar fuerit, ex sententia judicanto.*" It is not likely that this should have been the first enactment on the subject of juries. The earlier juries seem to have had many features of distinction from those of more modern date. Agreeably to the theory of professor Millar, they were the freeholders, or those who owed suit in the respective courts of the different jurisdictions. It may be observed, with reference to these older juries, that "ilk soytour, before he is admitted and receaved be the judge, should be examinat in thrie courtes, gif he can mak recorde of the courte (*of ane proces deduced in courte,*) or reporte ane sufficient warde (interloquitor) or dome anent wardes or exceptionns asked in courte, or may or can not doe the samine." They also exercised in their own persons the double character of witnesses and assessors; indeed it is extremely questionable whether originally they were entitled to receive the extraneous testimony of witnesses at all, or to decide upon any other evidence than their own private knowledge. "The assize passand forward, to tak inquisition of the maiter; either the richt of the pairties is well knawn to the assissours, or some of them hes knowledge thereof, and some are ignorant, or all ignorant. Gif nane of them knawes the trueth, and in the court testifies the samine be their grite eath, other persons sall be chosen in their plaice, untill sic men be chosen quha knaws the veritie. Bot gif some of thame knawes the trueth, and some knawes nocht, they quha are ignorant being repelled, others sall be admitted be the court, untill twelve men be found all agreeand togedder. All the assissours sall sweare, that in that maiter or debait vpon the decision quhere they are chosen, they sall nocht laine nor conceale the trueth wittingelie, nor na falsset say. It is requaired of thame quha sweares, to the effect they may have knowledge of the maiter quhilk is in questione, *that they know the veritie, be sight, or be hearing of themselves, or be narration of their fathers, or be sic sure tokens and arguments, to the quhilk they will give, or may give, als grate faith as to their awin proper (doings or sayings).*" The following passages show that evidence by the extraneous testimony of witnesses, and other proof, was at least in some cases customary: "All friemen may prove his debt to the valoure of fourtie shillings, by two witnesses quha heard and saw the samine, and swa be diverse witness, according to the quantitie of the debt. Ane debt may not be uthewise proven, bot be ane letter obligatour, or be confession of the debtour in the courte before the justiciar or the schirriff. It is uthewise before uthir judges. And it is to be noted, that quhen the pairtie hes named ane certain number of witnes, he may not thereafter eike nor paire the number of the witnes." In their sentence they were altogether independent of the judge; they had even the power of removing him out of

court altogether, "vntill the judgment be discussed by the soytours of the courte." It was indeed necessary that he should be present when sentence was given, "because it is trew that na judgement or sentence can be pronounced except the judge be sittand in court." But the sentence itself was entirely the suitor's own; it was pronounced in their name, and by the voice of one of their number; it "was not merely a verdict making way for sentence by the judge, but was the interloquitor or judgment of court on the whole matter referred." The judge's province seems only to have been to preside in court, and "informe the soytours, gif they be ignorant of the law, anent wardes (interloquitors) or decreits." By an old act "it is statute that na man suld thoill judgement, or be judged be ane man of an inferiour estaite, than his awen pair; that is, an earle, be earles; ane baron, be barons; ane vavassour, be vavassours; ane burges, be burgesses. Bot ane man of inferiour estaite may be judged be men of griter estaite." The trial *per pares*, or by jury, continued to prevail in the whole civil courts in Scotland, down to the institution of the old court of "the session." We find traces of it in the burgh courts, where the assize was composed of burgesses, or "the wyse and gude men of the burgh;" in the guild courts, where the brethren of the guild constituted a sort of assize; in the respective courts of the baron, the sheriff, the justiciar, the chamberlain, &c., in all of which the different classes of suitors or freeholders were bound to give attendance.

After the establishment of "the session," 1425, and more especially after the introduction of the more recent court of "the daily council" in 1503, jury trial in civil cases seems to have fallen into disuse. These courts, indeed, were not a soil where it could at all be expected to prosper. They had no class of persons who were properly analogous to the body of suitors. "The commissioners were, indeed, part of the king's feudal court of the parliament; but they were delegated and detached from it; they were assissours of his court; but when *separately* constituted, they sat in the character of *judges* solely; they had no retainers of suit; and, according to the analogy and principle of the feudal judicature, the materials of an inquest, *as distinguished from a judge*, did not exist in their courts."\* Still, however, there are to be met with, even in these courts, occasional instances of trial by jury; and in the more ancient and ordinary jurisdictions of the county it undoubtedly kept its ground, and continued to flourish in full perfection. It appears that, at a very early period, trial by assize was quite common; but that its existence in the other courts was recognized and sanctioned by the judgments both of the session and daily council. Spottiswood, in his *Practices*, quotes from a "book of decreets and acts," beginning 17th May, 1469, and ending 22d May, 1470. He says, "in those days all acts of spoliation, intrusion,

\* Ivory's Forms of Process, 275.



and others of that nature, were precognosed by an inquest of twelve men best knowing the land, whose declaration being presented to the judges thereafter, they used to determine, as they did in the action betwixt Nicol Forman of Hutton against George Kerr of Samuelston, anent the occupation of certain lands, which the said Nicol alleged to belong to him in property. The parties, of their own consent, named twelve gentlemen; these promised to inform and give counsel to the lords in the said matter, who being sworn, &c., and removed, returning gave their deliverance this way: 'We decree and deliver after our knowledge and understanding, that in no time bygone we ever heard that the laird of Samuelston had possession of the said lands, with manor, pasture, &c., or possessed before the last year, and that Nicol and his predecessors have ever been in peaceable possession of these lands, while the last year, &c.;' after which deliverance, the lords decerned Samuelston to desist therefrom in time coming."

It was not until the erection of the college of justice, and the establishment of the present "council and session," that jury trials seem to have materially suffered. Then, indeed, when the civil jurisdiction of the justiciar was annihilated, the mode of procedure, which had been customary in his court, was also laid aside. The new tribunal of the "council and session" was a total stranger to juries; it has even been conjectured that it was "made to consist of fifteen ordinary judges, the usual number of jurymen in Scotland, with a view to supersede the use of jury trials."\* Whether the learned professor's imagination be correct or not, it is certain that the example spread downwards; and the gradual change which took place "will not be surprising," says lord Kames, "when it is considered that an appetite for power, as well as for imitating the manners of our superiors, do not forsake us when we are made judges." But, perhaps a more substantial reason for the gradual disuse of jury trials in the inferior judicatures, is, that there could be no appeal to the court of session from any decision *proceeding on a verdict*. According to the established law, a judgment of fact pronounced by one assize could not be competently reversed, except by another; and as, after the subversion of the justiciar, there was no superior court of assize where this could be effected, the only way of rendering an appeal competent was to drop the jury altogether. The disuse of juries in the inferior courts was, however, extremely gradual. Lord Kames, in his law tracts, refers "to a book of the sheriff's court of Orkney, beginning 3d July, 1602, and ending 29th August, 1604," which he discovered among the public records. "All the processes engrossed in this book, civil as well as criminal, are tried by juries." His lordship also mentions "a book of the baron court of Crainshaw," in which numerous instances of jury trial occur so late as 1632. It is pro-

\* Millar's Historical View.

bable, were farther search to be instituted into similar sources, that additional discoveries might yet be made, and of a still more modern date. Even after the disuse of juries had gone its utmost length in the civil courts, there still remained a few peculiar cases of a civil character which could only be disposed of by their verdict. Thus, "in all cases by which the character of heir in land is determined—in all cases by which a person of full age is deprived of his right of acting, and declared incapable from furiosity or fatuity—in ascertaining the widow's rights to the lands of her husband, when there has been no settlement—and in striking the fiars of the different counties"—the verdict of a jury still continued to be indispensable. With these exceptions, however, trial by jury in civil matters fell into such utter and complete neglect, that, in the process of time, it came almost to be a question whether it had ever existed in Scotland at all.

The system of judicial procedure, which sprang up in the court of session on the ruins of trial by jury, has, of course, like every other system of an equally wide sphere of application, numerous defects; and among these the three following have always been placed in the most prominent situation, *viz.*: the abuse of taking proofs by commission, and reducing them to writing; the great delay unavoidably arising out of the form of process; and the frequent uncertainty of the ground of decision, from there not being a sufficient separation in the judgment, between the law and the fact; both being disposed of at once, and on a complicated and *cumulo* view of the whole case.

Some have maintained that these evils are not necessarily inherent in the system itself; and may, in a great measure, be corrected, without any radical or essential change in the constitution of the court. Others, again, have thought that they are not so easily to be eradicated; and various plans have been, at different times, proposed, to effect the necessary reform. Among the rest, the revival of jury trial has been repeatedly brought forward. It was, in particular, strongly urged by the late lord Swinton, in a very elaborate and valuable pamphlet published in 1789. It was again more recently proposed by lord Grenville, in his speech, in 1807, on the proposal for a reform in the court of session; and it has, at length, been actually carried into practice, under an act of parliament.\* The change that has thus been effected, does not carry back the trial by jury to the same high ground where it once stood. It does not restore it in every case, and under every jurisdiction; and that it does not, is perhaps to be considered as a real improvement. It was a mere partial experiment; the act passed on 2d May, 1815,† being only to be in force for seven years, in order to discover how far jury trial, in civil cases, may

\* 55 Geo. III., c. 42.

† 55 Geo. III., c. 42.

again be introduced in this country with advantage; and its operation was confined to such cases "wherein matters of fact are to be proved," as the judge admiral, the lords ordinary in the outer-house, or the judges of either of the inner chambers of the court of session may think it expedient to have investigated in this manner. It was likewise declared "lawful for the house of lords, in remitting to the court of session any cause which is now, or shall hereafter come before the said house by appeal from the said court of session, to instruct the division of the said court of session to which the cause is remitted, to order and direct such issue or issues as the said house of lords shall think fit, to be transmitted for the purpose of being tried by a jury." So that the jury court, properly speaking, is to be deemed not so much a separate and independent judicature, as a sort of permanent commission for leading and deciding on those proofs, which used formerly to be taken by a private commission, and reported to the respective courts in writing.

The judges of the jury court are three in number; consisting of "one chief judge, and two other judges, called 'the lords commissioners of the jury court in civil causes,' and hold their offices *ad vitam*, if the present, or any other act under which they shall be commissioners shall so long continue, or *ad culpam*."\* Originally their appointment was by commission under the great seal. "In case of future vacancies, the same are ordered to be filled up by a letter from his majesty, his heirs, and successors, directed to the president and senators of the college of justice."† And it is enacted, "that the persons so to be nominated shall be senators of the college of justice, or barons of the court of exchequer in Scotland; and that they shall be, at the time of their nomination, qualified to be senators of the college of justice."‡ In everything relating to the jury, as well as the mode of trial, the constitution and practice of this court were framed as nearly on the English model as the principles and tenets of Scottish law would permit. The most prominent feature of resemblance is the number of jurors, and the unanimity required in their verdict. Why an even number, such as *twelve*, should have been fixed upon, or why it should have been deemed necessary that these twelve should agree in their opinion, is not at first sight apparent; and there is something so extremely absurd in the very idea of a compulsory *agreement*, that we may well conclude with professor Christian, the learned commentator on Sir William Blackstone, that "the unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature."§ It is not improbable, that both the requisite of unanimity, and the limitation in the number

\* 55 Geo. III., c. 42, § 10.

† Ibid.

‡ Ibid.

§ Black. Comm. iii. 376, note 20.

of jurors, are both to be traced to the same source. A writer of considerable pretensions, who flourished towards the close of the seventeenth century, has, with the utmost gravity and seriousness, attempted to explain the difficulty in this way: "In analogy," says he, "of late the jury is reduced to the number of twelve, like as the prophets were twelve, to foretell the truth; the apostles twelve, to preach the truth; the discoverers twelve, sent into Canaan, to seek and report the truth; and the stones twelve, that the heavenly Hierusalem is built on:—and as the judges were twelve anciently, to try and determine matters of law; and always when there is any waging of law, there must be twelve to swear in it: and also, as for matters of state, there were formerly twelve counsellors of state. And any thing now, which any jury can be said to do, must have the joint consent of twelve, else it is in construction of law, not the doing of the jury, but of private persons, and void."\* The true explanation, however, appears to be, that although, by the original constitution of the courts of assize, and so long as the proper feudal suitors continued to be the assizers, a majority was in the general case entitled to decide; yet it was always under this qualification, that there should be *twelve at least* to concur in the verdict. In every case, therefore, "if *twelve* only appeared, it followed as a necessary consequence, that to act with effect, they must have been unanimous. And as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable." "The *grand assize*," says professor Christian, "might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree, the assize was afforced, that is, others were added, till twelve did concur. This, however, was a majority, and not unanimity. A *grand jury* may consist of any number from twelve to twenty-three inclusive, but a presentment must not be made by less than twelve. The same is also true of an inquisition before the coroner. In the high court of parliament, and the court of the lord high steward, a peer may be convicted by the greater number; yet there can be no conviction, unless the greater number consists at least of twelve. Under a commission of lunacy, the jury is seventeen, but twelve must join in the verdict. A jury upon a writ of inquiry may be more than twelve."† The same train of illustration may be followed out in the law authorities of Scotland. Thus we have the afforcement of the assize, the requisite of "*twelve at the least* being of one mind and concord."

The *unanimous* verdict of *twelve*, seems to have prevailed at one time in this country, as well as in England. In the books of the *Regiam*

\* Lord Somers' Guide to Eng. Juries.

Professor Christian's Notes to Black. Comm.

*Majestatem*, and other ancient authorities, there occur frequent proofs of this. Thus it is declared, that "twelve *loyall* men, neighbours, or of the court, quha sall sweare the grite eath, in presence of the pairties, that they sall declare quhilk of them hes best richt in their petition."—"Gif some says for ane pairty, and some for ane other, others sall be admitted, vntill *twelve* at the least be found of *ane mind and concord*, for either of the pairties." Likewise, under the briefs of Mortancestrie, &c. the assize was usually of twelve, "*all agreeand togedder*." But Glassford seems to think, that this may have chiefly been in those forms of proceeding which our ancestors borrowed from the English. Generally speaking, however, the practice in this country was rather indeterminate. From the old law of Kenneth Macalpine, the assize might consist of "*novem, undecim, tredecim, quindecim, aut numero majori modo is impar fuerit*:" and hence, we may conclude, a verdict by majority was the consequence. The recognition of minority was by eight. In some of the briefs still issuable from chancery, the number of the inquest is specified; in others it is left indefinite. By a retour of service in 1371, from the sheriffdom of Dumbarton, on a brief of chancery, it appears that the inquest was composed of sixteen persons. In criminal pursuits, the number of assizers varied in ancient times from nine to seventeen.\* The assize for trial of wilful error of assizers, was twenty-five. The burgesses, who, from twelve to sixteen in number formed, with the chamberlain, the ancient court of the four burghs, may also be considered in truth an assize. And the number appointed by the act of 1503,† to "be *set upon the falsing of dooms*" before the parliament, was from thirty to forty.‡ The usual number, however, seems to have been finally fixed at fifteen, which is the number of the assize in the present court of justiciary. It is likewise the number in serving all the modern briefs.§ Erakine says, that in the serving of heirs, "the inquest hath always consisted of an odd number, that an equality of voices might not make the verdict doubtful, sometimes *seventeen*, sometimes *thirteen* ; but it appears that, by the later practice, the number has been fixed to fifteen, as far back as Craig's time." That a verdict by *majority*, came latterly to be the custom, appears from a passage in Balfour ; where it is said to have been expressly decided, "that "gif the persounis of inquest beis discrepant, contraire unto uther, and equally divydit in their deliverance and determinatioun, except only the chancellor and odd man of the inquest, quha refusis to give his vote, alledgand that nane of the saidis pairties hes justly decernit in the maiter, and that he in his conscience is not perswadit nor inclynit to ather of their deliverances ; in this cais he may be chargit and compellit be the lordis

\* Hume, Trial for Crimes.

† Glassford.

‡ Ch. 95.

§ Book 111.

letteris, to deliver with the ane half of the assise, or with the uther, notwithstanding his alledgeance foirsaid.”\*

There are differences of opinion among legal men respecting the merits of trial by jury. While some bestow the most animated eulogies on that system, others again allege, that it is attended with some disadvantages : but it is evident that its superiority is great ; and the late lord Meadowbank has stated some of the principal advantages attending that system to be, 1. “ That the parole evidence of facts is taken in the presence of those who decide on it ; and that the trouble and expense of much discussion in review, is saved to the country ; and at the same time sufficient satisfaction given to the parties and the public, as to the due consideration of causes. 2. That practitioners are under the necessity of preparing causes, where fact is concerned, for being decided at one trial ; and the facilities of reconsideration are in a great measure cut off. 3. That an intercourse is created between courts of justice and persons of ability in the agricultural, manufacturing, and commercial lines of life, from which great benefits have been derived in England, both to the improvement of the law, and better administration of justice, in the adaptation of practice to the existing state of affairs, and in producing a general knowledge throughout the country of that practice, and satisfaction with, and confidence in, the exertions of the judges for the discharge of their duty.” “ It was mainly by this means, that Lord Mansfield was enabled to create a law-merchant for an age of advanced civilization ; and to bequeath to his country that great production of his unrivalled talents as a judge and a master in the science of jurisprudence.” To these advantages it may be added, that in no way so well as by jury trial, is that way to be attained between the law and the fact, which is so necessary to the precision and distinctness of the judgment, and which goes so far to fix legal precedents on a sound, uniform, and settled basis. It has also been urged that juries are, even in themselves, better qualified to decide on questions of fact and evidence, than judges who have made the law their study. But to this conclusion it is difficult to assent. And neither does there appear in civil matters any good reason for that extreme jealousy of permanent judges, which is harboured by many, and which is very strongly portrayed in the following quaint and amusing quotation : “ If judges had power of both determining the matter of fact, and also the matter of law, as must, if there were no juries, their latitude of erring, &c., must then be the greater, and their doing wrong or mischief might be the more, inasmuch as they might wrong one then in both the fact and law ; and their encouragement so to do would be improved, since then it must be harder to detect them, as whether erred in the fact, or in the law, or partly in both, like as it is easier

\* Balfour, p. 288.

seeking in a bush than a wood ; and as it is said, *occasio facit furem*, opportunity makes many a whore. But were judges presumed saints, and never so upright, &c., yet who can imagine, but at a trial, where witnesses are all examined, and evidence all given, the jury being so many persons, and probably knowing something of the matter before, they may, all assisting one another, better observe, remember, and judge upon the whole matter, than any one or two, &c. others, though called judges ? Certainly one may do more with help than without : so the proverb is, *Ne Hercules quidem contra duos ; oculi plus oculo vident*. Two to one is odds at foot-ball ; and the fewer may the more easily deceive, or be deceived. It's natural for man to err. None's without faults ; and the surest foot may slip."\*

Several acts of sederunt were passed, and a code of regulations were framed, detailing the forms of procedure in this court in conformity with the statute of 2d May, 1815 ; and agreeably to these the business was conducted until the 19th May, 1819, when the act was passed to amend an act for facilitating the administration of justice in Scotland, by extending the trial by jury to civil causes;† which having been attended with beneficial effects to the administration of justice : and it being found expedient that further provision should be made to extend and regulate trial by jury in civil causes, and that the said act should be in part altered and amended, and the court to be thereby created made a permanent part of the judicial establishment of Scotland. Be it therefore enacted, that in all processes raised in the outer house of the court of session by ordinary action, or otherwise, on account of injuries to the person, whether real or verbal, as assault or battery, libel or defamation, or on account of any injuries to movables, or to lands, where the title is not in question ; or on account of breach of promise of marriage, seduction or adultery, or any action founded on delinquency, or *quasi* delinquency of any kind, when the conclusion shall be for damages or expenses only ; the lord ordinary of the outer house, before whom such processes shall be enrolled, do remit, and is hereby authorized and required, after defences are lodged, to remit, the whole process and productions forthwith to the jury court in civil causes ; which last mentioned court is authorized and required, according to rules and regulations which the said court and the court of session are hereinafter empowered to make, to settle an issue or issues, and to try the same by a jury to be summoned and impannelled under the provisions now in force, or hereinafter enacted for that purpose. The 36th section of the act declared,‡ that the jury court in civil causes,

\* Guide to English Juries, by Lord Somers. Ivory's Forms of Process, &c. vol. II.

† 56 Geo. III., c. 42.

‡ 59 Geo. III., c. 35. sec. 1.

with all the officers belonging thereto, and the lord chief commissioner thereof, *shall remain in all time coming* a part of the judicial establishment of Scotland, and of the college of justice therein, subject to such regulations, for the better administration of justice, as may hereafter be made by parliament.\* In addition to declaring the jury court *permanent*, the act also appointed additional clerks, and amply provided for the erection of buildings for its accommodation.

The court of session passed several acts of sederunt on this occasion. "The lords of council and session, and the lords commissioners of the jury court, being regularly and duly assembled, and having taken into consideration the act of sederunt relating to the trial of civil causes by jury, passed on the 9th December 1815—the rules and orders of the jury court, made in pursuance of the 29th section of the said act of sederunt—the acts of sederunt of the 10th February 1816, 6th March 1817, 9th July 1817, 13th January 1819, 30th November 1819, and 19th February 1820, together with all the appendices thereto; found it expedient to repeal the same; and they accordingly *did* by act of sederunt of date the 3d July 1823, *repeal them in all their parts and provisions*, and did substitute the regulations therein specified, and the practical forms thereunto annexed in appendix in their stead."

On the 5th July 1825, the sphere of action of the jury court was still farther enlarged, by the passing of an act for the better regulation of the forms of process in the courts of law in Scotland.† By the 28th section of which it is enacted, that the following actions, whether originating in the court of session, or in the court of admiralty, shall be held as causes appropriate to the jury court; and for the purpose of being discussed and determined in that court, shall be remitted at once to that court, in the following manner:—All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation: all actions on account of any injury to movables, injury to land, where the title is not in question: all actions on account of breach of promise of marriage, seduction, or adultery: all actions founded on delinquency, or *quasi* delinquency of any kind, where the conclusion shall be for damages only, or expenses: all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody of goods or commodities, horses, money, clothes, jewels, and other articles; and, in general, all actions grounded on the principle of the edict, *Nautæ, caupones, stabularii*; all actions brought for nuisance; all actions for reduction on the head of furiosity and idiocy, facility and lesion, or on force and fear; all actions on policies of insurance, whether

\* 59 Geo. III., cap. 35. sec. 36.

† 6 Geo. IV., c. 120.



for maritime, fire, or life insurance ; all actions on charter parties and bills of lading ; all actions for freight ; all actions on contracts for the carriage of goods by land or water ; all actions for the wages of masters and mariners of ships or vessels.

By the original jury court act of 1815, and even by that of 1819, a process could not be remitted to the jury court, until not only appearance was made for the defender, but also defences lodged. The act of 1819 bears, that " the lord ordinary of the outer house, before whom such processes shall be enrolled, is authorized and required, *after defences are lodged*, to remit the whole process and productions forthwith to the jury court." But as in the class of causes, the record was, by the last statute,\* and the corresponding acts of sederunt, appointed to be prepared in the jury court for trial or decision, in a similar manner with the record in ordinary processes in the court of session, it became no longer necessary that the defences should be previously lodged in the court of session : and it was declared sufficient that *appearance shall be made*. When any of these causes was called in the course of the regulation roll, it was accordingly enacted :† 1. " That if *no appearance* shall be made when the cause is called, decree shall be pronounced in absence, according to the present practice : but, 2. If *appearance shall be made* for the defender, or as soon as the defender shall be reponed against the decree in absence, the lord ordinary shall forthwith remit the cause to the jury court." In the case, therefore, of appearance made when the cause is called, the interlocutor to be pronounced will be a simple remit to the jury court, conceived in these or similar terms :—

" *The lord ordinary remits this cause to the jury court.*"

The process will be forthwith transmitted to the clerks of that court by the clerk to the process in the court of session, and the proceedings thereafter go on before the jury court ; for it is provided by the act of sederunt regarding the jury court, " that from and after the 11th day of November 1825, in every case sent to the jury court, the process with all the productions and proceedings in the clerk's hands, and the receipts of such parts thereof as may be borrowed, shall be held and taken from the date of such interlocutor, to be subject to the order, and to be under the direction and authority of the jury court, and shall be forthwith transmitted to the jury court officer, by the clerk of session or admiralty, as the case may be."‡ And farther, " that the rules as to borrowing and returning processes, shall take place in the jury court as in the court of session."§

\* 6 Geo. IV., c. 120.

† Sec. 29.

‡ Sec. 52.

§ Sec. 45.

If no appearance is made, and decree in absence is pronounced, the interlocutor is:—

“ Decerns against the defender *in absence*, conform to the conclusions of the libel.”

The statute enjoins the lord ordinary and the court to dispose of the point of expenses at same time with the merits; but expenses being concluded for in the summons, are necessarily carried by the general interlocutor; and any special finding on this head is not only unnecessary, but may occasion trouble and delay in modifying the expenses. The pursuer having obtained decret *in absence*, or in *respect of no defences*, should forthwith lodge his account of expenses in process, and get the same taxed by the auditor. Monday is the day usually set apart by the auditor for taxing accounts of expenses in decrees in absence. It is enacted, “ that it shall not be lawful to extract any decree for the random sum of expenses concluded for in the summons.”\* But a *report* upon the pursuer’s account of expenses by the auditor, shall be a sufficient warrant and authority to the extractor to fill up the amount of expenses to be awarded against the defenders in the extracted decree, without the said report being brought under the consideration of the lord ordinary, unless by his own direction or that of the auditor, or on the motion of any party interested.

The statute did not empower the lord ordinary to review his judgment: but in this case the act of sederunt declared, “ that a party wishing to be reponed against a *decree in absence*, may apply to the inner house, by a short note, accompanied with the defences, or other paper required by the state of the process, merely setting forth the interlocutor or decret in absence, when the court shall repon him on payment of the previous costs, and shall remit the cause to the ordinary, to be prepared and proceeded in as accords.”† And again: “ Whereas it is enacted by section 29 of the statute, that if decree in absence has been pronounced in the actions enumerated in section 28, as soon as the defender shall be reponed, the lord ordinary shall forthwith remit the cause to the jury court: but as no provision has been made for reponing in the outer house a defender against a decree in absence, it is hereby enacted and declared, that when a defender has been reponed upon presenting a note to the inner house, and the cause has been remitted back to the lord ordinary, the lord ordinary shall then remit the cause to the jury court.”‡

At this stage, therefore, all the jury court processes, enumerated and comprehended under this head, were necessarily remitted by the lord ordinary to the jury court without farther discussion in the court of session.§

\* 1 & 2 Geo. IV., c. 33.

† Act of Sederunt, sect. 5.

‡ Act of Sed. sect. 66.

§ Beveridge’s Forms of Process, vol. i. p. 286, et seq.

The jury court was composed of a lord chief commissioner, legally qualified to hold the office of a senator of the college of justice, and of two other judges or commissioners, who were at the same time judges of the court of session;\* and by the statute, the king could appoint two judges of the court of session, to be additional commissioners of the jury court, should any considerable increase of business have arisen in it. The court had, besides, a suitable establishment of clerks and other officers, calculated for the discharge of the duties devolved upon it. There were three clerks, appointed by the king, who were either advocates or writers to the signet of three years' standing. The lord chief commissioner was also empowered to appoint a clerk during his pleasure, who kept the rolls of court, and performed the other duties connected therewith: and the king might, if necessary, have appointed a fourth clerk, and three assistant clerks or closet keepers. There were four principal clerks, and two assistant clerks connected with this court, besides the lord chief commissioner's clerk. The principal clerk's duty was to prepare and adjust the issues with the counsel and agents for the parties, and to make the preparations necessary for trial; and one at least of the principal clerks attended each sitting of the court. There were no fees exigible by the clerks of the jury court: the principal clerks had fixed salaries of £600, and the assistants, of £300, per annum.†

But the act which established the jury court as a trial, extended only to the year 1830; and therefore a new act was passed, uniting the jury court with the ordinary jurisdiction of the court of session, with which it is now permanently united: the following is the preamble and extract from the act, so far as it respects the jury court:—

WHEREAS, an act was passed in the reign of his majesty George III., "extending the trial by jury to civil causes;"‡ by which act certain commissioners were appointed for the trial of such causes, and certain regulations made in regard to such trials: and whereas another act was passed, for still farther "extending the trial by jury to civil causes:"§ and whereas another act was passed in the reign of his late majesty George IV., "for better regulating the forms of processes,"|| &c., by which last act certain provisions were made relative to the constitution of the jury court, and which provisions are declared to continue and be in force until the thirtieth day of June 1830, and from thence to the end of the next session of parliament; and it is further provided by the said last recited act, that it should be lawful for his majesty to appoint such persons as he should think fit, to make all inquiries as they should be directed by instructions from his majesty into the forms of proceedings in trials of civil causes by jury in Scotland, and to report whether these forms may be improved, and at what time, and in what manner, the union of the benefit of jury trials in civil causes with the jurisdiction of the court of session, may be best accomplished: and whereas, pursuant to the said last recited act, his late majesty did, by an instrument under his royal sign manual, appoint certain persons to make the inquiries, &c., as more particularly specified in instructions annexed to the said instrument: and whereas the said commissioners made a report upon the subject matters, which report has been laid before both houses of

\* 6 Geo. IV. c. 120.

‡ 55 Geo. III., c. 42.

† Bell's Law Dict. Ivory and Heveridge's Forms of Process.

§ 59 Geo. III., c. 35.

|| 6 Geo. IV., c. 120.

parliament: and whereas it is expedient, that the said recited acts should be altered, amended, and continued in certain parts, and that provision should be made for uniting the benefits of jury trial in civil causes with the ordinary jurisdiction of the court of session: and that in so doing, advantage should be taken of the knowledge and experience of the present lord chief commissioner and of the other lords commissioners of the jury court: and whereas it is also expedient that certain other\* alterations and reductions should take place in the judicial establishments of Scotland, be it enacted, that from and after the fifth day of October next, (1830,) the jurisdiction for trial by jury in civil causes, shall be united with and form part of the ordinary administration of justice in the court of session: and the trial of causes by jury shall take place in the court of session, as hereinafter directed.

II. From and after such union, all causes and issues, which, if they had occurred before the passing of this act, must have been tried in the jury court, shall be tried by jury in the court of session.

III. From the period of the union, the lords president of the two divisions shall respectively try by juries all issues arising out of causes depending in these divisions; and may otherwise respectively discharge all duties previously assigned to the lord chief commissioner: it shall continue to be competent to the said lord commissioner to perform all such duties: and farther, that for the space of three years from and after the time when such union shall take place, there shall be present and form a component part of the court, upon all occasions when either of the lords president shall respectively try by jury any issue arising out of a civil cause, either the lord chief commissioner of the jury court, or one of the judges of the court of session, who at the time of the union shall have held the office of one of the lords commissioners of the jury court.

IX. Trials by jury may proceed at all such times, as well during session as in the vacation, as the division of the court before which the cause stands enrolled shall appoint: and all causes remaining untied, and entered as ready for trial at the termination of the winter or summer sessions, or at the commencement of the Christmas recess, shall be tried at sittings of the court to be held immediately after these periods respectively, excepting only such causes as on the motion of any party, the court may think fit to postpone.

XI. All causes or issues appointed to be tried before every circuit court, shall and may be so tried before one or more of the judges of the court of judicary when upon circuit: and at all trials before any circuit court, the jury shall be taken from the lists prepared for the trial of criminal offences: provided always, that it shall be competent to either division of the court of session, if in their judgment it shall be considered necessary, to direct any causes or issues to be tried by any other judge or judges of the court of session at any circuit town; and if necessary for the trial of the same, to cause jurymen to be summoned in the manner provided by the before cited acts.

XVII. In the event of the death or resignation of the lord commissioner, or of any of the other lords commissioners of the jury court, no successor shall be appointed to any such judge or judges, as commissioner of the jury court.

XVIII. From and after the termination of the present existing interest in the office of lord justice general, that office shall devolve upon, and remain united with, the office of lord president of the court of session, who shall perform the duties thereof as presiding judge in the court of judicary; and the salary attached to the office of lord justice general shall cease.

XIX. When the office of lord justice general shall have devolved upon the lord president of the court of session, and when he shall deem it expedient to be present at any circuit court, it shall be lawful for him to despatch business in such court, whether any other judge or judges of the court of judicary be or be not present.

XX. When vacancies shall occur among the permanent lords ordinary of the court of session, whether by death, resignation, or removal into one of the divisions of the court of session, such vacancies shall not be filled up until the number of permanent lords ordinary

\* See court of admiralty.

shall be reduced to five, so that the total number of judges composing the court of session, including the lord president and the lord justice clerk, shall be limited to thirteen.\*

**THE TEIND COURT.**—At the Reformation, the rapacity of the nobles and barons, (or freeholders,) left the reformed clergy entirely destitute; and several expedients were tried for providing them with stipends, but which having all failed, a commission of parliament was appointed in 1617, to plant churches, and modify stipends out of the tithes of every parish within the kingdom. Other commissions were afterwards granted, with powers to unite or disjoin parishes, to value and sell tithes.† The act of 1617, c. 3, proceeds on the narrative, “that there be divers kirks within this kingdom not planted (provided) with ministers, wherethrow ignorance and atheisme abound among the people; and that many of those that are planted have no sufficient living or maintenance appointed to them, whereby the ministers are kept in poverty and contempt, and cannot fruitfully travel in their charges:” therefore certain commissioners were named, with power, “out of the teinds of every parochin (parish) to appoint and assign at their discretion, ane perpetual local stipend to the ministers present and to come.” The commissioners consisted of eight prelates, eight nobles, eight barons or freeholders, and eight burgesses, in all thirty-two; five of each of the estates were requisite to form a quorum.‡ The last commission was authorized by act 1693, c. 23; and by an act in 1707, c. 9, its powers were transferred to the judges of the court of session, who, since that time, have continued to exercise the powers thus conferred on them as a parliamentary commission, under the name of THE TEIND COURT, or, the COMMISSION FOR PLANTATION OF KIRKS AND VALUATION OF TEINDS.§

Before the reformation, the clergy of Scotland had acquired a very large and extensive property in land, by donations, legacies, and mortifications made by laymen to monasteries, abbeys, and other religious houses. The tithes and patronages of many churches, had also been conferred on these several religious institutions.

At the reformation, the temporalities of such benefices as had *not* been feued out in virtue of the statute of 1503, c. 91, and subsequent acts, were annexed to the crown by the act 1587, c. 29. Nevertheless many of these lands and estates thus annexed were conferred by king James VI., on deserving public servants, and also on his favourites. Under most of these grants were comprehended the tithes and patronages; and the grantees, thus acquiring rights to the tithes by a *written title*, were sometimes called *lords of erection*, but more commonly, *titulars of the tithes*. It became necessary, however, to make a legal provision for

\* 1 William IV., cap. 69, dated 23 July, 1830.

† Sir J. Connel on Tithes, vol. i. p. 111.

‡ Bell's Law Dict.

§ Bell's Law Dict.

the protestant ministers: and accordingly, in 1561, it was ordained by an act of council, that the *third* of all benefices should be applied to the maintenance of the ministers *in the first place*, and the residue to the support of the queen's household establishment: which assumption of the *thirds of the benefices*, was ratified by act of parliament in 1567, c. 10. A commission, under the name of *the commission of parliament for modifying stipends to ministers*, was accordingly granted by the crown, in 1561, to several of the nobility and superintendents. This commission met annually in the month of November, at Edinburgh, and continued to act until the bishops were restored in the year 1606. On their taking possession of the full powers of the episcopal office, a *new* commission was granted by statute 1617, c. 3, to eight bishops, eight lords, eight barons, and eight burgesses of the three estates of parliament, to take cognizance of the following particulars:—

I. To modify a particular stipend *out of the tithes*, to all ministers of churches not already provided with stipends; and also the ministers of such churches whose stipends did not amount to five hundred merks Scots in money, or five chalders of victual, (*as the minimum*,) besides manse and glebe.

II. To unite two or more parishes into one, provided the tithes of one of such parishes were *not* sufficient to pay the stipend, in which case the patrons were to have the right of presentation *alternately*.

III. When the tithes of the parish did not amount to five hundred merks, and where an union was inconvenient, to modify *the whole tithes* of the parish to the minister, besides manse and glebe.

IV. In making these provisions, to pay no regard to tacksmen, patrons, or others pretending right to the tithes: but as a recompense to the tacksmen for the loss occasioned by such modification, to grant them a *prorogation* of their tacks.

V. The *maximum* of stipend to be so provided, was limited to one thousand merks Scots, or ten chalders of victual, £55:11:11d. sterling.

This commission was only to remain in force till Lammas, that is, August 1618; and in its execution, the commissioners were empowered to summon *titulars of the tithes*, as also patrons, tacksmen, and all others pretending to have right thereto, to compel them to produce and submit their title deeds and writings to their inspection and judgment; and whose sentence was declared to be final.

Another commission was granted by statute 1621, c. 5, with similar powers to the last, but limited in duration to the tenth of January 1622. And farther, with power *also* to divide parishes when too large: but with this *proviso*, that the consent of the patron, tacksmen, and other parties having interest, should be had, both to the separating and dividing of parishes.

On his accession to the throne, Charles I. revoked all the grants of church lands which had been in some cases inconsiderately granted away by his father James VI.; and in 1626, he directed a summons of reduction of these grants to be legally executed. In consequence of the grantees applying to the king for confirmation, he instituted several commissions

for settling these rather intricate affairs ; and the several parties interested also *submitted* their respective rights to his majesty, on which, in 1628 and 1629, the king pronounced *four several decreets-arbitral*, which were afterwards recorded in parliament, and greatly facilitated their arrangement. In 1627, the commission of *surrenders and teinds*, was granted under the great seal, to certain clergy, nobility, and barons, who were empowered to treat with the proprietors, concerning the *erection and temporalities of benefices, teinds, parsonage and vicarage*, and certain other matters and things, which his majesty alleged were the property of the crown or principality, and had been unlawfully acquired and possessed by his subjects." This commission was renewed, with slight variations on the 9th July and 16th November 1630, and 7th January 1631. Under the king's warrant, these commissioners gave directions, in 1627, to the several presbyteries, to make choice of the most fit and indifferent persons within their respective presbyteries to be sub-commissioners for trying the valuation of tithes upon the report of these nominations, by the several presbyteries, commissions were issued by the general commission to the persons so named, and the powers granted to these sub-commissioners, were :—

I. To try and inform themselves, by all lawful means and ways, of the true worth of the lands of each parish in stock and teind, where the land hath been bruicked in stock and teind in time bygone, and what the lands pay at present—what they have paid in time bygone—and what they may pay of constant rent of stock and teind in time coming ; and that they report to the *general commission* the just and true worth thereof, in constant rent to their judgment.

II. And also to inform themselves, by all lawful means, of the constant rent and worth of the teinds, both great and small, when the teinds have been *drawn severally* from the stock *by the titular*, or his tacksman, not being heritors for the space of seven years, within fifteen years preceding the date of the commission.

III. They were also empowered, in case the heritor should desire it, to try the rent of the land, along with the teind, according to the true and constant rent of the land.

Under this sub-commission, and these excellent regulations, a vast number of parishes were valued ; and the reports of the most of these valuations by the sub-commissioners were confirmed and approved of by the general commission, and on the rule of payment of the teind (tithe) where they are extant at this day. By the statute 1633, c. 15, it is ordained, " that his majesty shall have an annuity of six per cent. out of all the teinds of the kingdom, excepting,

1. The teinds then paid to the bishops ;

2. Teinds paid to ministers, in name of *stipend*, for serving the cure;

3. And to colleges, hospitals, and other *pious uses*.\*

This annuity was granted by king Charles I. to James Livingston, a groom of the bedchamber, in security for a sum of £10,000 sterling, and which right was afterwards acquired by the earl of Loudon. King Charles I. stopped by warrant the levying of these annuities under this grant, since which time the *king's annuity* has not been levied. The proprietors and tenants of land in Scotland, have great reason to regard the memory of Charles I. with great thankfulness for the wise regulations which he adopted for the easy method of paying the established ministers their legal tithes; and the clergy of the present day are amply provided for, and saved from all angry collision with the occupiers of the soil.

It is ordained by the act of parliament 1633, c. 17, "That in time coming, *there shall be no teind sheaves, or other teinds, parsonage or vicarage, led and drawn, or led within the kingdom*: but that each heritor or liferenter of lands shall have the leading and drawing of their own teind, the same being first truly and lawfully valued, and the paying therefor the price specified in the act, in case they be willing to pay for the same: or otherwise, paying therefor the rate of the teind settled by the act." And it is thereby also declared, "that the just and true rate of teinds is, and shall be, the fifth part of the constant rent which such land payeth in stock and teind, where the same are valued *jointly*: and where the teinds are valued apart and *severally*, that the just rate thereof is, and shall be, such as the same is already, or shall be hereafter, valued and proved, before the said commissioners and sub-commissioners, *deducting the fifth part thereof* for the ease of the heritors." "Reserving always to such as shall find themselves enormously hurt by the leading of the said valuations, to pursue for rectifying of the same, before the commissioners appointed by his majesty and estates for that effect." And it is farther declared, "That the price of all teinds *which may be sold*, consisting either in money, victual, or other bodies of goods, is and shall be ruled and estimated according to nine years' purchase; the prices of victual, and other bodies of goods, whereof the teind consists, being reduced in money, according to the worth and price of the victual and goods in each part of the county to which the same is and shall be prized and estimated by his majesty's commissioners appointed, or to be appointed to that effect."

The act, cap. 9, of the same parliament, was in unison with the foregoing, and the commissioners were thereby empowered:—

"To prosecute and follow forth the valuation of whatsoever teinds, parsonage, or vicarage, as were then unvalued. To receive the reports of the sub-commissioners appointed within

\* Stair, B. II. tit. 8, sec. 13.



ilk presbytery, of the valuation of whatsoever teinds led and deduced before them, according to the tenor of the sub-commissioners' decret to that effect: and to allow or disallow the same, according as the same shall be found agreeable or disagreeable, from the tenor of their sub-commissions.

"The commissioners are also empowered to rectify whatsoever valuations, led or to be led, to the enorm prejudices of the titulars, and to the hurt and detriment of the kirk, and prejudice of the minister's maintenance and provision, or of his majesty's annuity.

"And to set down the prices of *saleable teinds*, according to the worth thereof, in each part of the county where the same grew and are bred.

"And also to set down such good and ample security, as may stand by law, both for the buyers of teinds, to the effect the titulars may be fully denuded in their favour: and also for security to the titulars and sellers of the price due, to be paid to them for the said teinds.

"And also to set down the security in favour of the titular and of the ministers, so far as concerns the maintenance assigned to them, for good, thankful, and timeous payment of the rate of teind, where the same are not, or cannot be sold.

"And to discuss and determine all questions which may arise betwixt the titulars and heritors, anent the price of teinds, according to the nature and quality of the rights to be sold; whether the same be heritable or temporary, and to proportionate the price accordingly.

"And also to divide the price of teinds betwixt heritors and liferenters thereof; and betwixt titulars, tacksmen, and others, who have several and distinct rights to the said teinds saleable, according to the qualities of their rights.

"And also to cause the titulars who sell the teinds to exhibit their rights and titles to the effect that they may be lawfully denuded thereof, in favour of the said heritors and liferenters respectively, without prejudice to his majesty's annuity; and to decide and determine in all other points which may concern the leading and drawing of teinds, and buying of the same, or payment of the rate thereof.

"And it is also provided, that the vicarages of each kirk, being a several benefice and title from the pursuer, shall be severally valued."

They were besides empowered to *modify competent stipends to ministers* out of the tithes not under eight chalders of victual, or 800 merks Scots money, unless when, upon special reason given, the commissioners should, in their discretion adjudge a less sum: and to divide and unite parishes, &c.

These commissions were followed in succession by others, all directed towards the same object, and evincing the strongest desire on the part of the crown for the comfort and respectability of the parochial clergy. By the statute 1661, c. 61, it was declared, that all valuations, acts and decrees, concluded by virtue of any commission granted by the "pretended parliaments of 1640, 1641, and downwards to the Restoration, should stand valid, notwithstanding the general and rescissory acts," passed in that parliament, excepting such decrees and sentences in favour of ministers for their stipends, or for dividing, uniting, annexing or building of kirks, as might be found to have been "unjust or exorbitant;" the determination of which was referred to the commissioners, who were empowered to annul or alter such decrees, conform to the laws and practice preceding 1649.

The price payable to titulars by heritors for the teinds of their lands was fixed, by previous commissions, at *nine years' purchase* of the free teind; but no rule had been laid down as to the price to be paid to patrons.

By the act 1690, c. 23, however, all teinds not before that time heritably disposed, are declared to belong to the patron of the parish, but subject always to tacks formerly granted and prorogations thereof, as also to ministers' stipends and all other burdens to which the teinds were formerly subjected. And the patron is obliged to sell each heritor the tithes of his lands at six years' purchase, according as the same shall be valued by the commissioners. And this benefit of the act was by a subsequent statute, 1693, c. 25, extended to the patrons of all patronages and other benefices without exception.

At the Revolution, prelacy, and "all superiority of any officer in the church above presbyters," was abolished; and in the following year, 1689, the presbyterian form of church government was established, "as being more agreeable to the inclinations of the people:"\* at which time the teinds belonging to the bishops reverted to the crown, *jure coronæ*, and consequently the tithes and other property of the bishops are not saleable; but leases of them are from time to time granted by the crown to individuals, upon payment of a suitable sum as a grassum, or fine, at the end of every nineteen or twenty-one years, and a small yearly teind, tack-duty, or rent.

The power of all these commissions was vested by queen Anne in the lords of session as the high commission of teinds, by the following act, which was partly occasioned by the destruction by fire of a considerable portion of the warrants of decrees, and other records of the various teind commissions. The act notices this circumstance in the preamble, and in the sequel provides for supplying the defect thus occasioned:—

*An act ment plantation of kirks and valuation of teinds, 21st February, 1707.*

Our sovereign lady and the estates of parliament, considering the great prejudice that does redound to this nation from the want of an established and fixed judicature, which may cognosce and determine in such causes and things as by former parliaments were referred to their commission for plantation of kirks and valuation of teinds, and through the loss of the registers of that court, which were burnt in the late fire that happened in this place, therefore her majesty and the said estates, do hereby empower, authorize, and appoint the lords of council and session, to judge, cognosce, and determine, in all affairs and causes whatsoever, which by the laws and acts of parliament of this kingdom, were formerly referred to, and did pertain and belong to the jurisdiction and cognizance of the commissions formerly appointed for that effect, as fully and freely in all respects as the said lords do, or may do, in other civil causes.

And particularly, but without prejudice to the generality foresaid, to determine in all valuations and sales of teinds, to grant augmentations of ministers' stipends, prorogations of tacks of teinds, to disjoin too large parishes, to erect and build new churches, to annex and dismember churches as they shall think fit, conform to the rules laid down, and powers granted by the 19th act of the parliament 1683, the 23d and 30th acts of the parliament 1690, and the 24th act of the parliament 1693, in so far as the same stand unrepealed. The transporting of kirks, disjoining of too large parishes, or erecting and building of new kirks, being always with the consent of the heritors, of three parts out of four at least of the valuation of the paroch, whereof the kirk is

\* Connel on Tithes.

craved to be transported, or the paroch to be disjoined, and new kirks to be erected and built, the minister in the meantime to serve the cure in the present kirk of the paroch.

And for that effect, appoint the said lords to meet and sit each Wednesday in the afternoon, during the time of session, and to call and discuss the causes summarily, conform to a roll to be made up and kept of the same.

And for supplying the lost registers of that court, her majesty and the said estates, do hereby appoint and ordain, that any authentic extracts from the said records be brought in, and being presented to the said lords, be recorded in a particular register: and that the said extracts so brought in be kept by the said lord clerk-register and his deputies, clerks to be appointed by him, for that effect, as their warrants, which shall be held and reputed as valid and authentic as the principal warrants themselves, if the same were yet extant; and the lord register and his deputies are ordained to give a new extract gratis, to any person that shall give in an old extract, immediately upon delivery thereof; and that extracts from these new records, shall make the like faith in judgment and outwith the same, as the extracts from the old registers of the commission were wont to do, before the same were burnt.

And further, empowering the said lords, upon such evidence and adminicles as they shall see cause to make up the tenor of such decree in manner above mentioned, whereof extracts are amissing, and the registers lost in the said fire: declaring hereby that the lord register and his deputies to be appointed by him, as said is, shall have the sole and only power and privilege of raising and subscribing of the summonses and diligences relating to the affairs above written, the same always bearing her majesty's common signet as formerly.

And also declares, that the maceors of privy council, who by their gifts did attend and officiate before the said commission of parliament, shall continue to attend and officiate before the said lords of session in the manner committed to them by this act, as they were in use to do before the commission, and none else.

And lastly, it is hereby declared, that this present act and commission, shall be subject, nevertheless to such regulations and alterations as shall be made by the parliament of Great Britain.

On the 30th June, 1808, the following act passed the imperial parliament, for defining and regulating the powers of the commission of teinds, in augmenting and modifying the stipends of the clergy of Scotland, which made several important alterations.

I. WHEREAS, by an act of the parliament of Scotland, in the year 1707, entitled, *Act anent plantation of kirks and valuation of teinds*, her majesty queen Anne, and the estates of parliament, empowered, authorized, and appointed, the lords of council and session, to judge, cognosce, and determine, in all affairs and causes which by the laws and acts of the parliament of Scotland, had been referred and did pertain and belong to the jurisdiction and cognizance of commissioners formerly appointed for that effect, as fully and freely in all respects, as the said lords did or might do in other civil causes: and certain powers mentioned therein, were particularly granted by the said act: and it was thereby declared, that the said act and commission should be subject nevertheless, to such regulations and alterations as should be made by the parliament of Great Britain. And whereas it is expedient, that the powers of the said lords of council and session, as commissioners aforesaid, should in some respects be defined and regulated, may it therefore please your majesty, that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, it shall not be competent to the said lords of session and council, as commissioners aforesaid, except as after specified, to augment or modify any stipend which shall have been augmented or modified prior to the passing of this act, until the expiration of fifteen years from and after the date of the last final decret of modification of such stipend.

II. No stipend which shall be augmented or modified by a decree after the passing of this act, shall be again augmented or modified until the expiration of *twenty* years from and

after the date of such decree of modification thereof: nor shall any such stipend be augmented or modified at any future period, until the expiration of *twenty* years from and after the date of the last decree of modification thereof respectively.

III. Provided always, that in all processes of augmentation or modification, in which the days of comparance had elapsed, and which shall have been called in court prior to the 12th day of March 1808, and which shall continue to depend before the said lords of council and session as commissioners aforesaid, at or after the passing of this act, it shall be competent to the pursuer either to suspend the same until fifteen years shall have elapsed from the date of the last preceding decree of modification, or to prosecute the same to a conclusion forthwith: and that it shall be competent to the said lords of council and session, as commissioners aforesaid, either to grant or to refuse an augmentation in any such cases, or to pronounce, or to refuse to pronounce, a decree of modification therein; provided always, that if the stipend, or any such depending case, shall be augmented or modified by a decree, after the passing of this act, the same shall not be again augmented or modified until the expiration of *twenty* years from and after the date of such decree of modification thereof: nor shall any such stipend be augmented or modified at any future period until the expiration of twenty years from and after the date of the last decree of modification thereof respectively.

IV. Provided farther, that this act shall not be deemed or taken to extend to any case, where a decree of modification has been pronounced prior to the passing of this act, and now depends either upon a petition to the commissioners, or an appeal to the house of lords.

V. Provided, that in the case last mentioned, no such stipend can be again augmented for fifteen years after the date of the modification.

VI. And in case of the said stipend being augmented at the expiration of the said fifteen years, it shall not be afterwards augmented or modified for twenty years.

VII. The commissioners may, in every case, refuse to augment or modify any stipend, either on account of there being no legal fund of augmentation, or on account of the circumstances of the case: and it shall be competent for any party to propose all relevant objections in any case whatsoever where an augmentation or modification shall be applied for, and which objections shall be determined by the said lords of council and session as commissioners, as heretofore.

VIII. Every stipend augmented hereafter, shall be wholly modified in grain or victual, even although part of it shall have been previously modified in money, or though part of the teinds shall be money teind, unless when it shall appear necessary, on account of the state of the teinds, or on account of the interest of the benefice, or on account of the nature of the articles other than grain or victual, which have been in use to be delivered in kind as victual, that a part of the stipend should be modified, not in grain or victual, but in money, or such other articles as have been in use to be delivered.

IX. In case of every decree of modification, it shall and may be competent for the said lords of council and session, to convert the said money stipend or money teind into grain or victual, according to the *fiar* prices of the kind or description of grain or victual into which the same shall have been converted according to an average for seven years preceding the date of the modification.

X. Where the parish shall not be altogether in the same county, or where no *fiars* applicable to the kind of grain modified shall be struck, the average of the said seven years shall be taken from the *fiar* prices of two or more of the adjoining counties. :

XI. No minister shall hereafter receive any part of his stipend in grain, but the value thereof shall be paid to him in money, according to the *fiar* prices for that year for which it is payable.

XII. Where no *fiar* prices shall have been struck for the county, or where the parish is situated in more than one county, the commissioners may direct the stipend to be paid according to the *fiar* prices of any two or more adjoining counties.

XIII. Provided that where there shall be different rates of annual *fiar* prices for any county or *stewartry* struck in virtue of authority from the sheriff or steward, the said

conversion from money into victual, and from grain or victual into money, shall be made according to the highest annual fair prices.

XIV. Any heritor may still, as heretofore, surrender his valued teind, instead of subjecting his lands to the stipend located upon them.

XV. The commissioners of teinds, nine being a quorum, shall meet at ten o'clock, upon the second Wednesday which shall happen after the meeting of the court of session for despatch of business in November and May, in every year respectively: and once a fortnight, on Wednesday, during the sitting of the court of session, and at such other times, and on such other days, in the months of December, January, and March, not being any of the days upon which the court of session meets, as the said lords of council and session shall find necessary or proper for executing the powers committed to them by this act.

XVI. The said commissioners may make rules and regulations for abridging the forms and expenses of citing heritors and others, and for executing the business committed to them with as much expedition, and as little expense, as possible.

XVII. And in order to guard against collusion, and also in order that no processes of augmentation or for modification of stipends, shall be raised on the ground of alleged collusion, every minister insisting in the process of augmentation, besides citing the heritors, shall also cite the moderator and clerk of his presbytery, and furnish them with a statement of the amount of his present stipend, and the addition to it which he means to crave, in order that the presbytery, if they shall judge it proper, may appear as parties to the process; and in the event of the presbytery entering no appearance, the minister shall forthwith transmit to the moderator or clerk of his presbytery, a certified copy of the interlocutor pronounced by the court; and it shall be competent to the presbytery, within five months after such interlocutor, to enter an appearance and to show, if they shall see cause, that the decree of modification pronounced is collusive and prejudicial to the benefice: provided that if the presbytery shall enter an appearance in such process, it shall be competent to the court to subject the minister insisting in such process, in the whole, or any part of the expenses of process incurred by the presbytery.

XVIII. And further, all the powers given and granted by the said in part recited act, to the commissioners thereby appointed, shall remain and continue in force, and receive such and the like effect as they do at present, excepting in so far as they are altered or repealed by this act.\*

The sixteenth section of the foregoing act empowers the lords of council and session "to make rules and regulations for abridging the forms and expense," &c.; and in conformity they passed an act of sederunt of 5th July, 1809, of which the following is an abstract, containing many useful regulations still in force, for the use of the teind court. By all former acts, a power of making rules by acts of sederunt, was vested in the court of session, many of which remain in force, but the whole proceedings are now regulated by the following:—

The lords, &c., do enact, *lmo*, that from and after the 12th day of July, 1809, it shall not be necessary for the pursuer of any process of augmentation, modification, and locality, to cite the titular or tacksman of the teinds, or heritors, liferenters, or other intromitters with the teinds, in the manner or upon the *inducia* heretofore required: but that as soon as a summons of augmentation, modification, and locality, is raised and signeted, it shall be competent to the pursuer to cause cite the titulars and tacksmen of the teinds, heritors, and liferenters, and all others having or pretending to have interest in the teinds of the parish, by the proccentor giving public notice from his desk, immediately before the congregation is dismissed from the forenoon service, that the minister of the parish has raised a summons of augmentation of his stipend, which will be called in court on Wednesday, being the day of

next to come, not being less than six weeks after the date of the first

\* 48 Geo. III., c. 138.

notice; and that this notice shall be repeated for *three* several Sundays, at the time above mentioned, and a certificate by the precentor, that such public notice has been given upon three several days in presence of two of the parishioners, who shall subscribe as witnesses, shall be forthwith transmitted by him to the pursuer's agent. A notice in writing, in like terms, shall also be affixed to the most patent door of the church by a messenger at arms, or a constable, on the same day when the first notice is given from the precentor's desk, and such messenger or constable shall retain a certificate subscribed by himself and two witnesses, that such notice has been affixed by him. The pursuer shall also cause notice to be inserted three several days in the Edinburgh Evening Courant, the Caledonian Mercury, and Edinburgh Advertiser, that he has raised a summons of augmentation, modification, and locality, which will be called in court on Wednesday, being the                      day of                      , not being less than *six weeks* from the date of the first advertisement.

*The mode of citation and induciæ above mentioned, shall be deemed sufficient, although one or more of the defenders shall be a pupil or minor, or out of the kingdom, at the time such citation shall be given.*

When it is necessary to call the officers of state for his majesty's interest, it shall be done in the manner that has hitherto been in use, upon the *induciæ* of *six weeks*.

And it is further enacted, that it shall be a sufficient citation to the moderator and clerk of the presbytery, that the pursuer himself shall write to the said moderator and clerk, in terms of the 17th section of the statute, provided always that such letters shall be inserted in the presbytery record *one month* before the summons is called in court; and such certificate by the precentor of the parish, and messenger or constable, with the notices in the newspapers above mentioned, execution of citation to the officers of state, and certificate from the presbytery clerk, that the pursuer has written to the moderator and clerk of presbytery in terms of the statute, and that the letters are recorded in the presbytery books, shall be held as sufficient citation to all parties.

When any of the defenders die during the dependance of the process, his heir may be called by a diligence in the manner and upon the *induciæ* hitherto used; but such diligence may be executed either by a messenger at arms or by a constable; and when it is necessary to *waken* a process, it must be done by a summons of *wakening*, in which all parties having interest must be called in the same manner and on the same *induciæ*, as in the original process.

*Endo.* The pursuer of any process of augmentation, shall as soon as the summons is signed, lodge with the clerk of court a note, stating the amount of the stipend, distinguishing how much is paid in money, and how much in victual, and in what species of victual, and the measure by which it is paid; and also stating the amount of the communion elements. The pursuer must also, at the same time, produce a rental of the parish, distinguishing the rent of each heritor.

*Scio.* As soon as the summons is called in court, the pursuer may enrol it, and all concerned will be allowed to see the summons and writings therewith produced, in the clerk's hands, for *fourteen days*. After the elapse of the term allowed for seeing, the pursuer may enrol the cause, when a proof will be allowed of the rental of *minors' lands*; and the heritors, who are major, will be held as confessed upon the rental, unless one or more of them shall take a day to depone, in which case a day shall be assigned to the whole heritors who are major, to depone on the rental: and one act and commission shall be extracted for the whole, upon which any of the heritors or their factors may depone, and upon which a proof of the rent of *minors' lands* may be led: such act and commission to be extracted at the expense of the heritors deponing: *but the rental of minors' lands may be proved by a certificate thereof under the hand of any one of the tutors or curators of such minor, or of their factor, without the necessity of extracting any act and commission.*

*Alto.* When the day assigned for deponing and proving, shall have elapsed, the pursuer may again enrol the cause, and pray that the term may be circumduced, and that a remit shall be made to an ordinary to prepare a scheme of the rental, either according to the rental which the minister gave out along with his summons, if there has been no proof, or according to the proof which has been led, and the certificates of rentals and decrees of valuation produced.

5to, When the scheme of the proven rental is prepared, the cause may be enrolled, in order that parties may be heard upon the merits. When the court grants an augmentation, the cause will be remitted to an ordinary, to prepare a locality, and to report. The pursuer of the augmentation may, immediately after such remit, enrol the cause before the lord ordinary, and crave his lordship to ordain the heritors to produce their rights to their teinds, if they have any, in the hands of the clerk, within a time to be specified in the interlocutor, not being less than *three months* from the date thereof: with certification, that after the elapse of that time, a remit shall be made to the clerk to prepare a scheme of locality, either according to the proven rental, in case no rights are produced, or according to the rights and interests which are produced by the heritors: and that this scheme so prepared shall immediately be approved by the lord ordinary, and *afterwards by the court*, as an *interim scheme*, according to which the minister's stipend shall be paid, aye and until a final locality shall be settled, and the minister furnished by the common agent with an extracted decree at the expense of the heritors, for which he is entitled to take credit in his account. The lord ordinary shall at the same time ordain the heritors or their agents, to meet for the purpose of naming a person to be suggested to the lord ordinary as common agent for suggesting the locality. A short notice of this interlocutor shall be inserted in the Edinburgh Evening Courant, Caledonian Mercury, and Advertiser, the expense thereof to be paid by the common agent out of the general fund.

6to, And in order to enable the court to carry the said act into execution, the sheriff and steward clerk of every sheriffdom and stewartry is hereby required within *three months from the date hereof*, to transmit to the teind clerk a certificate of the fiars for the last seven years, distinguishing the fiars of each year: and every sheriff and steward clerk is farther required to transmit to the teind clerk a certificate of the fiars of every year in all time coming, within fourteen days after they shall have been struck, as they shall be answerable.

IN PROCESSES OF AUGMENTATION, MODIFICATION, AND LOCALITY OF STIPEND.—In the teind court, all summonses and diligences, *cum processu*, are signed by the clerk of that court, and *not* by a writer to the signet; but they must pass the signet. The summons of *augmentation* consists of two branches; the first directed to ascertaining the suitable quantum of stipend to be paid to the minister; the other, the shares or proportions thereof, which shall be paid out of each heritor's tithes. The summons also concludes for a suitable sum for communion-element money, which is modified at same time with the stipend, and varies according to the circumstances of the parish; being in general £8:6:8d., or £10 sterling, and in some extraordinary cases even more. Formerly the summons was issued blank, and only filled up when it was about to be filed in court. But the act of sederunt of 12th November 1825, enacts, "that no summons shall hereafter be issued blank, but shall be fully libelled before it passes the signet: and that the pursuer shall also state, as accurately as he can in the summons, the number of inhabitants, the precise extent of the parish, and other circumstances on which he founds, in support of his claim.

STIPEND.—Formerly the stipend consisted partly in money, and partly in victual delivered in kind. If the teinds of the several heritors happened to be valued partly in both, the augmentation was sometimes so granted as to exhaust the whole valued victual, and then a certain sum in money

was added to complete the amount. But by the act, already cited p. 493, it will be seen in what manner the stipend is at present paid.

The strong desire which well disposed men have to avoid altercation, and personal disputes, was thought sometimes to operate too much with a minister when seeking an augmentation: and in consequence, compromises, and dividing of differences adverse to the interests of the succeeding incumbents at least, frequently followed. To check this, the 17th section of the same act\* gives directions for citing the moderator and clerk of the presbytery of the bounds, and directs the minister to transmit to them a certified copy of the interlocutor of augmentation.

It was long a debateable point, whether after a regular decree of modification had been granted and extracted, it was afterwards competent to raise a new process, libelling a change of times and circumstances, and crave an augmentation. When its competency was at last declared, as well as that the judgments of the teind court were subject, like those of the court of session, to *review*, *by appeal* to the house of peers,—the frequent applications at short intervals, to augment stipends, rendered some limitation necessary; accordingly the first section of the above act, provided a remedy. And by the seventh section, the commissioners may in every case refuse to augment or modify any stipend, either on account of there being no legal fund of augmentation, or of the circumstances of the case. The expense of the process of augmentation is always borne by the minister himself, unless the circumstances are very special indeed, whether the heritors oppose the augmentation or not. But the heritors pay their own counsel and agent, and are at the sole expense of the *after* process of locality. Formerly, when the adjustment of the *final* scheme of locality was very long protracted, it was usual for the minister, *at his own expense*, to extract his decrees of modification, and to compel the payment of his augmented stipend, by charging a few of the larger heritors, who from the extent of their free teind, could neither object to this, nor suspend the charge, unless upon consignation. But one of the excellent regulations enacted by the act of sederunt already cited,† authorizes the common agent to furnish the minister with an *interim decret of locality*, at the common expense.

**MINISTERIAL JURISDICTION OF THE COURT IN REGARD OF SMALL STIPENDS.**—By recent statutes,‡ a ministerial jurisdiction was conferred on the teind court. By the first, it was statuted and ordained, and declared, that all heritors and liferenters of lands in Scotland, should be entitled to have the teinds or tithes of their lands valued at certain fixed rates, to be paid for the same in all time coming: and whereas, in many parishes in

\* 43 Geo. III., c. 138.

† 5th July, 1809.

‡ 50 Geo. III., c. 84.; 5 Geo. IV., c. 72.



Scotland, where the stipends of the parochial ministers are payable out of the tithes, *in consequence of the depreciation of the value of money*, the stipends of such parochial ministers have become inadequate to their support and maintenance: and on account of the valuation of tithes which has taken place, no funds exist out of which future augmentations of such stipends can be granted. And whereas in several parishes where the stipends of the parochial ministers are payable out of funds and revenues separate and distinct from the teinds, such stipends have also become inadequate to the support and maintenance of the ministers thereof, and no funds exist out of which such stipends can be augmented: and whereas it is expedient, that means should be provided for augmenting the stipends of each of such ministers as aforesaid, to a yearly amount or value of *one hundred and fifty pounds sterling*, and it appears that an annual sum not exceeding *ten thousand pounds sterling*, will be sufficient to carry these purposes into effect: it is therefore enacted, that from and after the passing of this act, there shall in every year, be set apart and appropriated in the hands of his majesty's receiver-general and paymaster in Scotland, out of the public revenues and money received and collected by him, an annual sum, not exceeding in the whole the sum of £10,000, to answer the purposes of this act. And by section second, the clerks of the different presbyteries are enjoined to make up accounts of the different parishes within each presbytery, the stipends of which parishes do not extend in their yearly amount or value to the sum of £150 sterling, and which cannot be augmented to that extent under the laws at present in force, either by reason of the teinds of such parishes being already exhausted, or for want of other funds, out of which such augmentation could be made; or where, from the small amount or value of the unexhausted teinds, it has been deemed inexpedient to bring actions of augmentation: which accounts shall specify the amount of each such stipend in money, grain, or other articles, in which the same is payable, and the rate at which such grain or other articles, if not in use to be paid in kind, are convertible into money; and if in use to be paid *in kind*, the value thereof, *on an average of the last nine years preceding the passing of this act*: and the period *when* such stipend was last augmented: and if any *unexhausted teind* remains, specifying the amount or value thereof, as far as the same can be ascertained.

The court were thereby directed to take these accounts into consideration, in order to certify such cases as required to have the stipend made up to £150, out of the said sum of £10,000 a-year, set apart for that purpose; and the requisite schedules were directed to be recorded in the exchequer, in order to precepts being issued by the barons of exchequer, addressed to the receiver-general, for payment to the several ministers of the requisite sums to make each of their stipends up to £150 a-year,

*besides* the sum payable to them in name of *communion elements*, payable out of the teinds. Under this act of parliament, the small stipends have now been nearly all provided for. But it appearing on investigation, that many ministers, whose stipends were of small amount, were without either a manse or a glebe, and the low price of grain having also caused the average conversion to fall below the sum reported at making up the small stipends, the sum of £2000 was voted\* to be annually paid out of the exchequer, for making up the stipends to the sum of £150 per annum, so that no established minister in Scotland can have less than £150 per annum. And besides, should the stipends be diminished £5 per annum, below the sum guaranteed by law, the fourth section of the act provides for their being made up by the exchequer.

The *form* of application to the teind court is exceedingly simple. It must be intimated to the agents for the officers of state in the matter of tithes. When to make up the stipend to £150, it is done by a minute in the name of one or more ministers claiming to have their stipends made up to £150, accompanied by certificates from the presbytery clerk, given in and enrolled before the junior lord ordinary. This minute is allowed to be seen, and at the next calling, in the course of the lord ordinary's hand-roll, if no objections are stated on the part of the officers of state, a remit is made to the teind clerk, to prepare a *schedule* : after which the case is again put on the lord ordinary's hand-roll, and the schedule allowed to be seen. If no objections are offered, the lord ordinary approves of the schedule. The minute is then enrolled in the inner house teind roll, and the proceedings resumed before the whole lords sitting in judgment in their ministerial capacity, and the lord ordinary's report approved of. After this, extracts of the schedules are transmitted to the exchequer.

In the case of the manse and glebe, the application is in the form of a printed petition to the whole lords, detailing the circumstances and history of the parish. This petition is either appointed to be answered, and if no objection be made, the petition is *de plano* granted. In order to defray the expenses, one shilling in the pound is directed to be kept off the first year's payment.

The process of augmentation, when the minister insists on it merely to exhaust the teinds, so as to entitle him to claim for the deficiency in the exchequer, will be libelled and conducted in all points precisely as if there were abundance of free teinds in the parish to pay him an adequate stipend. But as soon as the cause comes duly prepared to the augmentation roll for debate, decree for the whole teinds of the parish will terminate the suit, unless, indeed, the heritors whose teinds are *not* valued, persist in having the ceremony of a locality gone through. If the whole teinds are

\* 5 Geo. IV., c. 72.

valued, and their amount agreed on and specified in the scheme of the proven rental, the minister, without abiding a decree of locality, may terminate the proceedings as to him, and follow out his application for relief under the acts referred to touching small stipends, as soon as he has got his decree of augmentation. The only consequence of the heritors demanding a process of locality, will be to saddle them with its expense, instead of their allowing him to extract his decree of modification at his own expense.

In any process of transportation, annexation, disjunction, and erection, the patron or the presbytery may insist as pursuers or plaintiffs; but no heritor or body of heritors can do so, unless possessed of lands to the extent of *three parts in four* of the valued rent of the parish. The defenders are all persons having a real interest in the process, viz., the titular, the patron, the heritors, the liferenters, the presbytery within whose bounds the parishes lie: leaving out, of course, the parties at whose instance the process is insisted on. I have dwelt longer on the constitution and forms in this court, than may perhaps be thought necessary; but to the country ministers and the country heritors, such information as is here given may, it is hoped, be acceptable.\*

THE SUPREME CONSISTORIAL, OR COMMISSARY COURT.—The term *consistorial court*, is now applied to the commissary court, which was substituted in place of the bishop's court; and the bishop's court derived its title from the courts held by the Roman emperors.† The commissaries or officials, were anciently the delegates of the clergy, for judging in those questions which fell within the ecclesiastical jurisdiction; which the clergy anciently established, not only in questions of tithes, patronage, scandal, breach of vows, and other ecclesiastical matters, but in all other cases which were by any means analogous to them. And being early intrusted with the administration of certain legacies, they gradually assumed the exclusive right of proving or confirming testaments, and of naming administrators for managing the movable estates of such as died intestate. The bishops judged not only in cases of adultery and divorce, because in the church of Rome marriage is called a sacrament; but in the restitution of dowers, because they were given in the view of marriage: and by the *regiam majestatem* it is declared, that debates concerning marriage, testaments, advocacy of kirks, and rights of patronage, also all cases of bastardy, and all controversies in which an oath intervened; because an oath is an act of religious worship addressed to the Deity, should belong to the ecclesiastical courts. In consequence of this extensive jurisdiction, the clergy were too much called off from their sacred

\* Bell's Law Dictionary. Sir J. Connel on Tithes. Beveridge's Forms of Process.

† Bell's Law Dictionary.

functions; they therefore committed the judicial part to their vicars, who were called *officials*, or *commissaries*. Hence the commissary court is called the bishop's court, or the *curia christianitatis*; and it is sometimes called the *consistorial* court, a word used to denote the court in which the Roman emperors sat with their councils, the *comites consistoriani*, either for the determination of private causes, or for consultation on public affairs, and afterwards transferred to the courts held by churchmen, and which gave the title of the *sacred consistory* to the conclave of cardinals.

At the Reformation, all episcopal jurisdiction exercised under the authority of the Roman pontiff was abolished by an act of the estates in 1560, which was afterwards ratified by queen Mary.\* The queen made a new nomination of commissaries, one in every diocese, who were to act under the royal authority, and immediately erected a new commissary court at Edinburgh, by a grant dated 8th February, 1563. It has a double jurisdiction, one *diocesan*, which it exercises over the special territory contained in the grant, viz., the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire, although in practice this diocese is confined to the three Lothians. The other jurisdiction is *universal*, by which it confirms the testaments of all who die in Scotland without a fixed domicile, and reduces the decreets of inferior commissaries. There was but one commissary in each diocese, until the erection of the commissary court of Edinburgh, after which inferior commissaries were established under a commission from James VI., in most of the principal towns in Scotland.

Upon the establishment of episcopacy, the bishops were restored to the nomination of their commissaries by act of parliament 1609, c. 6, and the right of naming the four commissaries of Edinburgh was given to the two archbishops of St Andrews and Glasgow, each of whom was to name two. After the erection of the see of Edinburgh, the archbishop of St Andrews' right of nominating two of the commissaries was transferred to the bishop of Edinburgh, subject, however, to the archbishop's approval. But since the revolution, the nomination of all the commissaries has reverted to the crown, there being no legal successors to the bishops; and since that time the commissaries have invariably been laymen. Although the court of session is the king's great consistory, yet it has no inherent jurisdiction in consistorial causes in the first instance; it only judges in the way of advocacy. Neither does it give sentence in any consistorial cause brought before it by advocacy, but remits it to the commissaries with instructions how to proceed: and after the commissaries have delivered judgment, and the decree is extracted, they have no power of review, except upon a remit from the court of session.

\* Act 1567, c. 2.

At the Restoration, it was judged necessary that the commissary court should be reinstated in their ancient rights and forms, as during the usurpation of Oliver Cromwell, they had suffered very considerable innovation. In consequence, they received a new set of instructions by his majesty king Charles II., on the 21st January 1666, as follows:—

1. You are to decide in causes concerning benefices, teinds, scandal, confirmation of testaments, all causes testamentary, and all causes wherein oath is required, if the same exceed not forty pounds, and in all other causes where parties submit themselves to your jurisdiction.
2. In cases of declarator of nullity of marriages, divorces, bastardy, or adherence, where the same has any connexion with the lawfulness of marriage, or adultery; all which belong to the commissaries of Edinburgh *privative*; but when the adherence is pursued on account of malicious desertion only, and where there is no question of the nullity or lawfulness of the marriage, the inferior commissaries may decide.
3. That in processes for *res leves* not exceeding forty pounds, there be two diets of citation: and the defender's oath, if instantly offered, shall be taken. If the defender desire to see, a short time shall be given. If the claim be referred to his oath, and he appear not to be warned *pro tertio*, and cited personally, to be holden as confest. If the claim be small, and neither referred to oath, nor instantly verified, he is to get a short time to answer *verbo*; and if convened as representing any other person, as executor, intromittor, &c., you are to assign a term to qualify, and give in his defences in writing.
4. The same methods must be observed in *arduis*, and that the dispute be in writing, as the difficulty of the case requires.
5. The clerk shall have one book for all the ordinary diets and acts, and another for acts of liti-contestation, wherein shall be summarily set down the substance of the libels, allegiances, and liti-contestations thereon: which record shall be sufficient, without necessity of either extract or register, or extracting an act of liti-contestation *ad longum*, except the parties desire a long extract of the same.
6. That your clerks keep a register of all decreets, and those within forty pounds be curtly recorded.
7. After liti-contestation, the party cannot pass from his comparance, but all such acts and decreets shall be *parte comparentie*.
8. That your summons be execute by a sufficient man before two witnesses, and questioning the same shall not stop the principal cause: and if any of your executions be found false and unproven, the contrivers and abettors thereof, depending on your court, shall be declared incapable of trust thereafter, and farther punished according to their accession thereto.
9. You may summon witnesses to compar, under such pecunial fines, as you may think fit; and, on contempt, your officers are to uplift those fines, and peind therefor, the half thereof to your own use, and the other to the poor; and to fine them in greater sums on the second summons, or to raise letters of horning, as you think fit: and that you be still present at examining of witnesses, so your procurators shall not persist to make frivolous allegiances, under pain of deprivation.
11. At advising, you are not to consult or suffer any procurator to be present.
12. You shall decern liberal expenses, and ordain execution therefor, as for the principal sum.
13. You may direct your precepts to your own officers, messengers, or any other officer in your bounds: and on their deforcement, you may judge thereon, and inflict the ordinary punishment of deforcers, excepting escheat, which must be sued for before the judge competent.
14. If temporal judges cognosce in causes belonging to you, you may direct precepts inhibiting them.
15. You shall give forth inhibition of great and small teinds, on sight of the parties' title allenary.
16. If reduction be intended before the commissaries of Edinburgh, of any of your decreets, you may not the less cause your sentence to be executed: and if not pursued within year and day, the party being of age and in the kingdom, your decret stands unreduceable.
17. You and your clerk must live within the commissariat, under pain of deprivation, except, on grave occasions, you have liberty from the bishop.
18. You shall have a register of all the testaments you confirm, and shall yearly give authentic doubles thereof to the bishop.
19. The clerk at compting on the first day of May and November yearly, shall depone to the bishop, that all the testaments confirmed are booked in the books then produced.
20. You shall give forth no precepts in matters above forty pounds, till the

decreet be extracted. 21. On your being sick or declined, the bishop is to depute another in your room. 22. You must find caution to compare the first day of May and November yearly, and compt with the bishop or his quote-master for the quote and contribution money to the commissaries of Edinburgh, under pain of five hundred pounds *toties quoties*. 23. If your clerk confirm testaments which are not booked and compted for to the bishop, your office walks *ipso facto*. 24. Your bishop's license must be had to admit your procurators, who with yourselves, are to wear gowns: but you may create your own officers. 25. That of the profits of summonses, sentences, and other writs, with the seal and signet, two parts to be the commissaries', and the third the clerk's, he furnishing paper, wax, ink, and chamber.

All matrimonial cases, such as actions of declarator of marriage, legitimacy, nearness of kin, adherence, divorce, bastardy, &c., belong to the private jurisdiction of the commissaries. In questions of bastardy, their jurisdiction is limited to the life of the alleged bastard. An action for having it declared that one deceased was a bastard, and that his estate is fallen to the king, like all other declarators of escheat, must be pursued before the court of session. All testamentary cases, making up titles to personal estates of defuncts by confirmation, questions concerning executory, and division thereof, constitutions of the debts of deceased persons, separation *a mensa et thoro*, &c., belong to the diocesan jurisdiction. In causes having only a remote resemblance to consistorial causes, the jurisdiction of the commissaries is cumulative with other judges ordinary: such as in actions of benefices, tithes or teinds, applications for inspecting or sealing up the writings of persons deceased: or actions brought by their creditors or legatees against the executors. But when a privileged creditor brings an action purely to constitute his debt, without a conclusion for payment, such an action is deemed purely consistorial, and must be brought before the commissaries *prima instantia*. Questions of scandal, or verbal injuries, have been always looked upon as consistorial; and, so, proper to the cognizance of the commissaries: and in all instructions given from time to time by the crown to these judges, actions of scandal are also mentioned as falling under their jurisdiction.

For many years past, the commissaries of Edinburgh have been members of the faculty of advocates, and appointed by the crown *ad vitam aut culpam*, and the office has always been esteemed honourable. The crown always appoints the principal commissary clerk *ad vitam aut culpam*, that is for life or good behaviour. The principal clerk appoints his deputy clerk, who is always appointed during his own life, having no reference to the life of his principal. He is appointed in his commissior extractor of court, with powers to name a substitute under him. Both principal and depute clerks sign summonses, testaments-dative, extracts, and other deeds of court. The crown also appoints the fiscal of court *ad vitam aut culpam*, whose office is to give concurrence in actions where the same is deemed necessary. The faculty of advocates, and the society of

solicitors, are the practitioners of court. The commissaries appoint their own macer. His duty is to execute edicts and summonses of court; call the rolls in court after the clerks; take charge of the gowns; attend the office; and execute the commands of the commissaries' clerks, and other members of court. The officers of court reside, some within the city, and others throughout the commissariat; they are never admitted but upon petition, and must find caution (that is, security) for their faithful administration.

The court has two seals or signets, one larger and the other smaller, on which are engraven the crown and thistle, with the motto, *nemo me impune lacesset*; and in the circumscription, *sig. officii commissariatus Edinburgens.* All consistorial summonses, acts, and diligences therein, and testaments-dative, &c., are signeted with the large seal, and the repositories of dying and deceased persons are sealed up with the smaller one.

The actions competent to this court may be divided into three classes: 1. Consistorial causes privative to the commissaries, such as declarators of marriage, nullity of marriage, adherence, divorce, desertion, bastardy, separation, and aliment, and the confirmation of testaments. 2. Of actions that have a resemblance to consistorial causes, such as scandal and defamation, actions against the executor confirmed, cognition, &c.; and, 3. Of actions wherein the commissaries have only a cumulative jurisdiction.

Though the decisions of the commissaries were always subject to review in the court of session, still considering the vast importance and delicacy of consistorial questions, it was long thought satisfactory that the accurate and deliberate preparation of such cases was obtained at a moderate expense, in a court not distracted by the multifarious business of the common law courts, and whose judges consequently became peculiarly qualified for their important trust. Of late years, however, it has been thought expedient to transfer the consistorial cases to other courts. In the reign of George IV.\* the first step towards this design was by suppressing the district commissaries, transferring their jurisdiction to the sheriffs of counties, and permitting no appeal from them unless directly to the court of session. In the present reign,† the jurisdiction which the commissaries of Edinburgh possessed within their own peculiar district, has now been restricted to the county of Edinburgh; and on the death of the present judges, this restricted portion is to be transferred to the sheriff of Edinburgh: while that which extended to Linlithgow and Haddington, has been already transferred to the sheriffs of these counties respectively. In

\* 4 Geo. IV., c. 97.

† 1 Wm. IV., c. 69.

the mean time, the commissary court at Edinburgh is the *commune forum* for the confirmation of testaments of persons dying *furth* of Scotland; and at its final dissolution, at the death of the present judges, the sheriff court of Edinburgh becomes the common court. No part of the provincial duty was difficult, or very unlike the ordinary business of a sheriff's court; but whether the transference of the privative jurisdiction which the commissaries exercised over Scotland, in the great consistorial questions, to the court of session, be any improvement, must be left to the test of experience.\* Till the passing of the recent statute, the court of session

\* The transference of the privative jurisdiction of the commissaries of Edinburgh to the supreme court, being attended with some disadvantages, Mr Lothian has the following remarks on their removal:—

1. That to secure one of the advantages which was enjoyed in the consistorial court where there were no *vacations*, the powers of the court of session, when not sitting, should in all consistorial questions, be vested in the lord ordinary. We do not say this, merely because it is required for the peace of mind of the litigant, whose rank and fortune are probably dependant on the issue of the suit, but because very serious and irreparable injury may result from the *death of either party during the vacations of that court*. If the pursuer of a divorce die before sentence, the guilty party has saved every legal or conventional right. If the defender dies before sentence, the claims of the next of kin, notwithstanding of the adultery, are good against the innocent pursuer. It is sufficient, in both of these events, that there was no divorce. It cannot be pronounced after the death of either party.

2. The court of session should not be limited in the power of granting commissions for taking proofs to the commissaries alone, while they remain in office. It was usual for the commissaries to grant commissions to qualified individuals resident in remote districts or abroad, where the poverty of the party, indisposition of witnesses, or any sufficient cause, called for it. When the proof is not sent to a jury, it is now, however, enacted, "that the remit shall be made to the commissary court of Edinburgh, which court, or any judge thereof, shall take such proof."

3. It is declared, that the jurisdiction of the commissaries, beyond that possessed by sheriffs being commissaries in the different counties, has entirely ceased, "save and except such as may regard the granting of confirmation of testaments of persons dying *furth* of Scotland." But it is equally necessary to grant to them, or to some other court in Scotland, jurisdiction in regard to testaments of persons happening not to "die *furth* of Scotland," and yet not having any fixed domicile within it; for example, travelling merchants, soldiers, or foreigners in Scotland on a visit. In regard of these very ordinary cases, by an error in the act, the *commune forum* is abolished.

4. In regard to the preliminary action of adherence to found a divorce, the commissaries of Edinburgh, till their offices become vacant, and after that, the court of the sheriff of Edinburgh, should be declared the *commune forum* for citing parties, who, in violation of their conjugal duties, have absconded and gone abroad. As the action of adherence is not made competent in the court of session, and the *commune forum*, as to this particular, has not been reserved to the commissaries, we do not see, till the act is amended, how a divorce on the head of wilful desertion, where the party has fled out of Scotland, can at present be obtained. This certainly was not intended; and no one can reflect on the circumstances which generally give rise to the action of adherence, without wishing that this error may be speedily corrected.

5. The act seems to have put an end to a form of process, by which a man, doubtful of the legal import of his own conduct towards a woman, was enabled at once to bring it under the judgment of the commissaries. We allude to the action of declarator of *freedom and putting to silence*, which was often the only mode left to check reports industriously circulated by a woman and her friends, in the hope of ultimately founding a claim of habit and repute. This action is not yet made competent to the court of session, while the clause in the statute which declares, "that the commissary court of Edinburgh shall possess and exercise the same and no other jurisdiction in the sheriffdom of Edinburgh, than that possessed and exercised by sheriffs, being commissaries, in other sheriffdoms in Scotland," which plainly excludes it from the court of the commissaries of Edinburgh, it not being competent in any sheriffdom.

6. It is declared by the statute, that actions of aliment are competent to the sheriff courts. If interim aliment be meant, it was unnecessary to insert any such provision in the statute, because the judge ordinary always had the power of adjudging such aliment. On the other hand, if permanent aliment be meant, it is obvious the sheriffs can only award it on finding



had no jurisdiction, *prima instantia*, in such causes. It only judged of them by advocacy, and remitted with instructions. But now a clause enacts, "that all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation, *a mensa et thoro*, shall be competent to be brought and insisted on only before the court of session." The same act declares actions for aliment to be competent to the sheriff's court.\* As this act does not include the process of *adherence* necessary to found the action of divorce, it remains with the commissaries of Edinburgh, against parties domiciled *within their restricted territory*, until their offices become vacant; after which it passes to the sheriff of Edinburgh. The sheriffs of counties are now competent to try actions of adherence against parties resident within their territory.†

THE HIGH COURT OF ADMIRALTY.—The lord high admiral of Scotland had anciently very extensive powers and jurisdiction, both in a judicative and a political capacity, and which were exercised by a person designed the judge of the high court of admiralty. He was the king's lieutenant and justice-general upon the high seas, and the coast and kingdom: in this court, all treaties of commerce with foreign countries were recorded; all embargoes, in time of war, were laid on by its authority; and all letters of marque and reprisal were issued under its seal. It had likewise a radical privative jurisdiction in all maritime and mercantile affairs, both civil and criminal. Some doubts, however, having arisen, with respect to the jurisdiction of this court, its limits and extent were at length fixed and ascertained by the following statute:—‡

that either marriage or good ground for separation has been proved: but these questions are, by the same statute, declared to be exclusively competent in the court of session, thus leaving the powers of the judges ordinary in alimentary questions exactly where they were: while a woman in the lower ranks, seeking a separation and separate aliment on the ground of maltreatment, has lost the benefit of the commissary court.

7. It is a grave question too, whether, since the law of Scotland holds marriage to be contracted by express or constructive consent, it be just to deprive the poorer classes of the means which they have hitherto enjoyed, of judicially establishing that such consent has been interchanged. It would be better to abolish the law altogether, under the proffered protection of which, a woman may be induced to surrender herself to a consensual contract, than to put that protection beyond her reach by interposing a tedious and expensive lawsuit. But this is an evil which applies to all the cases now transferred to the court of session; and will be felt where the policy of rendering justice accessible to the poor is indisputable: for example, in the case of a poor woman suing for declarator of marriage celebrated in the face of the church.

The whole of these errors might have been avoided, and the full benefit of the statute attained, namely, the prevention of reiterated appeals, simply by adopting the suggestion of the parliamentary commissioners in their third report for 1818, which was to allow only one appeal, and that directly from the commissary court to the inner house of either division of the court of session, passing over the bill chamber and outer house altogether.§

\* 1 Wil. IV., c. 69, sec. 53.

† 4 Geo. IV., c. 97.

‡ 1681, cap. 16.

§ Boyd's Judicial Proceedings. Mr Lothian's Law Practice and Styles Peculiar to Consistorial Actions, &c., 1830. Bell's Law Dictionary.

Our sovereign lord, considering that the clearing and establishing the jurisdiction of the high admiral of this kingdom will greatly tend to the advancement and encouragement of trade and navigation: therefore his majesty, with advice and consent of the estates of parliament, doth ratify and approve the fifteenth act of the twelfth parliament of king James VI., in the whole heads, clauses, and articles of the same: and decerns and declares the high court of admiralty to be a sovereign judicature in itself, and of its own nature to import summary execution. And statutes and declares, that the said high admiral, as he is his majesty's lieutenant and justice-general upon the seas, and in all ports, harbours, or creeks of the same, and upon fresh waters, or navigable rivers below the first bridges, or within the floodmarks, so far as the same do, or can at any time extend; so the said high admiral hath the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, whether civil or criminal, whatever, within this realm, and over all persons, as they are concerned in the same. And prohibits and discharges all other judges to meddle with the decision of any of the said causes in the first instance, except the great admiral and his deputies alienary. And statutes, ordains, and declares, that it is the privilege of the said high admiral to cause parties to become enacted and find caution, not only for compareance, but for performance of the acts and sentences of his court; and that he may punish all breakers of his arrestments, and resisters of his officers in the execution of his precepts, and apply the fines and amercements to his own use, conform to the laws of the kingdom. And further statutes and declares, that the high court of admiralty is a supreme court; and that the decreets and acts of all other inferior courts of admiralty are subject to the review and reduction of the said high court of admiralty. And for the more ready and quick despatch of justice in maritime and seafaring causes, foreign and domestic, whether civil or criminal, within this realm, and over all persons, in so far as they are concerned in the same, both to natives and strangers: our sovereign lord, with advice and consent foresaid, prohibits and discharges all advocations in the aforesaid causes, from the said court of admiralty to the lords of session, or to any other judges whatsoever, in all time coming: and that no suspension, or other stop to the execution of the decreets or acts of the court of admiralty be passed by the lords of session, at any time hereafter, except by the whole lords *in presentia* in time of session, and by three of the said lords in time of vacation, met together to that effect; and that if any suspensions or stops shall happen to be passed in manner foresaid, the same be summarily discussed upon a bill, and be privileged and exeemed from the ordinary-course of the roll; and if, upon discussing thereof, the same shall be found to have been unjustly and maliciously raised, that the said high court of admiralty may, upon the application made by the parties concerned, modify and decern the damages they have sustained by the said suspensions and stops of execution of their acts and decreets, attour the expense of plea before the lords of session, which is to be modified by the said lords of session. As also his majesty, with the advice and consent foresaid, statutes and ordains, that it shall be lawful and competent to the said court of admiralty to review their own decreets and sentences, if there be just occasion for the same. And his majesty, with the advice and consent aforesaid, decerns and declares, that it is the sole right and privilege of the high admiral and his deputies, the judges of the high court of admiralty, to grant passes and safe conducts to all ships; and inhibits and discharges all others to grant the same, as they will be answerable upon their highest peril. And his majesty, with advice and consent aforesaid, causes, annuls, and rescinds, all and whatsoever laws, acts of parliament, or customs, contrary to, or anywise inconsistent with this present act.

From this period down to the Union, the judge of admiralty exercised all the above recited powers and jurisdictions: and as the preservation of the rights and jurisdictions of the court affected the trade and commerce of the nation, an act in the reign of queen Anne, provided,

That all admiralty jurisdiction shall be under the lord high admiral, or commissioners for the admiralty of Great Britain: and the court of admiralty now established in Scotland shall be continued; and all reviews, reductions, or suspensions of the sentences in maritime

causes competent to the jurisdiction of that court, shall remain in the same manner as now in Scotland, until the parliament of Great Britain shall make such regulations as shall be judged expedient for the whole united kingdom: so as there be always continued in Scotland a court of admiralty such as in England, for determination of all maritime cases, relative to private rights in Scotland, competent to the jurisdiction of the admiralty court, subject nevertheless to such alterations as shall be made by the parliament of Great Britain.\*

The jurisdiction and privileges formerly competent to this court, have been, since the Union, exercised by a lord high admiral, or vice admiral, appointed by his majesty, and who again grants commissions to inferior admirals during pleasure. By the above cited act of 1681, the jurisdiction of the high court of admiralty extends to all maritime causes; and so comprehends questions of charter party, freight, salvages, wrecks, bottomries, policies of insurance, and in general all contracts concerning the lading or unlading of ships, or any other matter to be performed within the verge of the admiral's jurisdiction. And all actions for delivery of goods sent on ship board, or for recovering their value, or where the subject of the suit consists of goods transported by sea from one port to another. All these causes are privative to the admiralty court, and must be brought before it *prima instantia*. Thus, though the court of session may review the admiral's decrees by suspension, it cannot carry a maritime action from him by advocacy; and even when causes depending before inferior admirals are brought by advocacy before the court of session, they generally remit them to the high admiral, who is declared by the statute sole judge in the first instance.

This court has power not only to review and reduce the decrees and sentences of inferior admirals, but likewise its own. And there is frequently occasion for the high admiral to review his own decrees: because defenders are often decerned in terms of the libel, for failing to find caution, *de judicio sisti et judicatum solvi*: and it is highly expedient that the court of admiralty should be vested with power to exact such caution, because frequently strangers are cited before it, who might by withdrawing out of the kingdom, render its jurisdiction ineffectual, unless caution (security) was found. It is therefore the uniform custom of this court to ordain defenders, in causes purely maritime, to find security accordingly; and upon their failing to do so, to decern in terms of the libel. The defender may be compelled either to find such security, or to go to prison upon the pursuer's application, even before the action is called in court: the pursuer deponing that he has just reason to suspect that the defender is about to leave the kingdom, and in *meditatione fugæ*. And on the other hand, the pursuer must find security for the defender's expenses and damages (if insisted for) in the event he shall be found entitled thereto.

\* 5 Anne, cap. 8.

It was also peculiar to this court, for libels to contain different conclusions. For instance, they might contain a constitution of the debt against the common debtor, and a forthcoming against the person in whose hands arrestments have been used; or a constitution of the debt, and a sale by auction of the vessel arrested. Judgments pronounced upon such actions have been repeatedly affirmed by the court of session.

This court was also competent in mercantile matters, but had no private jurisdiction therein, nor was entitled to exact security from the parties, as in maritime cases. Thus the high court of admiralty had a cumulative jurisdiction in the first instance with the court of session, between merchants and others beyond seas, and between them and persons in Scotland, arising from contracts, or otherwise relating to commerce; and actions upon bills of exchange, from time immemorial, have been found competent to the high court of admiralty, as being *in re mercatoria*; but deputy admirals had no jurisdiction in cases merely mercantile. In a case which depended before the court of session, on 17th July 1506, the competency of the admiral's arrestment, founded upon an inland bill, having been objected to, the lords by a solemn decision sustained the arrestment.

The lord high admiral of Scotland held his office from the crown, during his majesty's pleasure, and had the appointment of the officers, judge, clerk, and all the subordinate admirals in Scotland.

The procurator-fiscal of court held his office by gift from the judge-admiral, and enjoyed it *ad vitam aut culpam*. His duty was to give his concurrence in all actions before the court when necessary.

The faculty of advocates were entitled to plead and practise before this court, as well as the procurators belonging to it.

The principal clerk of court, who is the extractor, held his office from the high admiral, and enjoyed it *ad vitam aut culpam*. The deputy clerk held his commission from the principal, and the office depended upon the principal's life.

The macers of court were appointed by the judge-admiral. Their duty was to execute summonses and warrants of court; or when the party was at a distance, to grant concurrence to messengers at arms to do so.

The British arms and an anchor were engraven on the seal; with the motto, *Honi soit qui mal y pense*: and in the circumscription, *Sigillum Admiraltatis Scotiæ*.\*

In the present reign the court of admiralty in Scotland has been entirely abolished, and its jurisdiction transferred to the court of session, by "An act for uniting the benefits of jury trial in civil causes with the ordinary

\* Bell's Law Dictionary. Boyd's Proceedings before the Inferior Courts in Scotland.

jurisdiction of the court of session, and for making certain other alterations and reductions in the judicial establishments of Scotland,"\* as follows:—

XXI. And whereas all maritime causes may now be brought by reviews before the court of session, and many causes formerly heard and determined by the high court of admiralty are now remitted to the jury court: and whereas the court of judicatory holds a cumulative jurisdiction with the high court of admiralty as to all crimes competent to be tried by the high court of admiralty: and whereas it has become unnecessary and inexpedient to maintain any separate court for maritime or admiralty causes; be it therefore enacted, that the high court of admiralty be abolished, and that hereafter the court of session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings, of the same nature and extent in all respects as that held and exercised in regard to such causes by the high court of admiralty before the passing of this act: and all applications of a summary nature connected with such causes, may be made to the lords ordinary on the bills: provided always that all such causes, not exceeding the value of twenty-five pounds sterling, shall be instituted and carried on, in the first instance, before an inferior court, in the manner directed, and with the exceptions specified in an act of parliament of Scotland passed in the year sixteen hundred and seventy-two, intituled *An Act concerning the regulation of the Judicatories*.

**SHERIFF'S COURT.**—Like most of our other offices of jurisdiction, that of sheriff had formerly been hereditary in the great families of the nobility, and the jurisdiction of the sheriff seems anciently to have been very extensive, but the establishment of the court of session naturally drew to it the more important feudal questions. The office of sheriff, in Scotland, differs very essentially from the same office in England. By statute,† after the attempt of Prince Charles Edward on the British crown, the hereditary jurisdictions of the Scottish nobility were resumed, and annexed to the crown. The crown being the fountain of justice, and by the fundamental principles of the British constitution, the king has alone the right of creating courts of judicature.

The king, therefore, is sheriff-in-chief over every county, and appoints a deputy. The sheriff depute is the magistrate, or judge ordinary constituted by the crown over a particular shire or county. The office is of considerable antiquity, and from the nature and extent of the jurisdiction attached to it, and the numerous and important duties falling to be discharged by it, the legislature has wisely provided‡ that there shall be one sheriff depute, or steward depute, in each county or stewartry, to be appointed by the king, who must be an advocate of three years' standing, and who is likewise very properly declared incapable of acting as an advocate in any case brought from the county of which he is the sheriff depute. These deputies are each authorized to name one or more substitutes, either over the whole shire, or within a particular district of it, for whom the depute is responsible; and they may not only hold courts at their chief burghs or county towns, but itinerant courts, when or where they please, or where they shall be directed by his majesty, on previously publishing notice at the several parish churches within the district where

\* 1 Wil. IV., c. 69, sec. xxi.

† 20 Geo. II., c. 43.

‡ 1bid.

they intend to hold their court. Every deputy is bound to reside personally within his county or stewartry for at least four months in the year. All the sheriff deputies who were appointed by the act in 1756, or should afterwards be appointed, are to hold their offices *ad vitam aut culpam*: but for malversation, or misbehaviour in his office, a sheriff depute may be deposed by the court of session, at the suit either of the king's advocate, or of any four freholders, who before the passing of the reform bill were entitled to vote in the election of a member of parliament for the county: or in the event of delinquency being charged and established against him in parliament, an address founded on it, to the king, by either house, would of course produce his removal from office.\*

No sheriff, or steward depute or substitute, can be steward, chamberlain, or commissioner, in any subject whatsoever, nor collector of the cess, neither can he exercise nor act in the service, employment, or office of any such, under the penalty of an *ipso facto* forfeiture of his office of sheriff.

The sheriff's jurisdiction, both civil and criminal, was anciently nearly as ample within his own territory as that of the supreme courts of session and justiciary was over the whole kingdom: for he received in his court the four pleas of the crown, viz., murder, robbery, rape, and fire-raising, when authorized by the justiciary; and he judged in declarators of property, or pleas of right, and in other questions of the greatest importance: and even after his jurisdiction came to be more limited, it retained for a considerable time this supreme mark, that it received causes from the baron-courts of subject-superiors to the sheriff court. And to this day the sheriff judges in all actions upon contracts or other personal obligations to the greatest extent, whether the suit be brought against the debtor himself or his representative, in forthcomings, in poidings of the ground, in mails and duties, and in all possessory actions, as removings, rejections, spulzies, &c.: in all briefes issuing from the chancery, as of inquest, terce, division, tutors, &c., and even in adjudications of landed estates, when proceeding on the renunciation of the apparent heir, but in no other adjudications, except perhaps adjudications in implement. His present criminal jurisdiction extends to certain capital crimes, as theft, and even murder, though it be one of the pleas of the crown; and he is competent to most questions of public police, and has a cumulative jurisdiction with justices of the peace in all riots and breaches of the peace.

In the reign of George IV.,† it was enacted, that from and after the 1st January 1834, the sheriffs or stewards depute of the respective counties in Scotland, (excepting Edinburgh, Haddington, and Linlithgow,

\* 21 Geo. II., c. 19.

† 4 Geo. IV., c. 97.

which sheriffdoms shall be and remain, the commissariat of Edinburgh, as provided for by the same act) shall fill the office of commissary and sheriff substitutes within their respective shires, and shall exercise within their respective commissariats, the power and authority exercised by the former inferior commissioners, with certain exceptions provided by the act. By another act, 20th May 1825,\* it is enacted, that from and after the passing of this act, it shall be lawful for any sheriff in Scotland, within his county, to hear, try, and determine all civil causes and complaints, that may be completely brought before him, wherein the debt or demand shall not exceed the value of eight pounds sterling, exclusive of expenses and fees of extract, in a summary way.

**SHERIFF'S DUTIES AND JURISDICTION IN CRIMINAL MATTERS.**—Sheriffs are bound to attend the judges of justiciary when on their circuit *ayres*: and since the new regulation of their courts, they relieve justices of the peace of a great part of the criminal business, judicial as well as ministerial and magisterial, which devolves on their brethren in England.

The old method of taking up dittay† by the stress and Porteous rolls,‡ was abolished in the reign of queen Anne; and the act§ directs, that after the 1st May, 1710, the sheriffs, magistrates of burghs, and other inferior judges, shall upon the 22d day of February and 22d day of July, annually, hold courts at their usual places of sitting, there to receive information of matters criminal to be tried at the ensuing circuits. And these magistrates are bound to transmit written abstracts of the accusations offered to them at their respective courts, forty days at least before the sitting of the respective circuit courts, to the lord justice-clerk and his deputies, containing the material circumstances of the several charges, and of the evidence by which they are supported, so as indictments may be prepared in due time, and in proper form, for the trial of the persons accused. This statute farther commits the making of presentments to the justices of the peace assembled in quarter sessions, or in two meetings to be held by them for that special purpose, on the days already mentioned. But in practice this duty has devolved upon the sheriff, whose office was new-modelled in 1748, on a plan which affords far better security than formerly for his skill and diligence in such matters; and imposes on

\* 6 Geo. IV., c. 24.

† *Dittay*, is a technical term in criminal law, signifying the matter of charge, or ground of indictment against a person accused of a crime. The manner of *taking up dittay*, as it was termed, or obtaining information and presentments of crime, in order to trial, has undergone various changes.—*Bell's Law Dict.*

‡ *Porteous Roll*.—This was a roll of the names of offenders, which, by the old practice of the justiciary court was prepared by the justice-clerk from the informations of crimes furnished to him or his deputies, by the local authorities in the different districts comprehended within the circuits. The justice-clerk seems also to have prepared the indictments, and to have taken the other steps necessary for bringing offenders to justice.—*Bell's Law Dict.*

§ 8 Anne, c. 16.

him the obligation of making immediate inquiry into the nature and circumstances of every crime committed in his sheriffdom, as soon as his fiscal or the party injured shall prefer any complaint to him. Hence it generally happens, that the offender has been arrested or held to bail, and the whole precognition\* finished and transmitted to his majesty's advocate, who is now the proper officer for receiving it, before the statutable day for the presentment of crimes.

For illustrating with greater effect the sheriff's jurisdiction in criminal matters, we shall here briefly advert to the exclusive jurisdiction of the court of judicatory. This results, in some instances, from the nature of certain crimes: for example, in the case of treason, for which the lord advocate alone can prosecute: all prosecutions of justices of the peace, sheriffs, magistrates of burghs, other inferior judges or officers, for negligence, corruption, or malversation in office, to which may be added prosecutions for deforcement of messengers. In other cases, this exclusive prerogative is the creature of statute: such as the crime of *sorning*,† or extorting meat and drink from others by force or menaces; the crime of *notour adultery*;‡ that of assaulting ministers for causes pertaining to their clerical functions; that of blasphemy, or denying the doctrine of the holy trinity; that of clandestine marriage, if the celebrator is to suffer banishment, or corporal pains; that of seducing artificers to go abroad;§ and, in general, that under all statutes inflicting the doom of transportation, which is not within the commission of the sheriff, or other inferior judges: while this affords a ground for the like interference as to simple banishment from Scotland. This catalogue is still augmented by that of incest; the cursing or beating of parents; the attempt to kill a minister, or rob his house; the fighting a duel;|| the invading (assaulting) of a privy counsellor; the new felonies created by the riot act;¶ the enlisting of soldiers to serve in a foreign state, all which are peculiar to the judicary. Besides all those offences against the officers of the revenue acting

\* *Precognition* is an examination by the judge ordinary or justices of the peace where any crime has been committed, in order that the facts connected with the offence may be ascertained, and full and perfect information given to the public prosecutor, to enable him to prepare the libel or indictment, and carry on the prosecution. In this investigation, the witnesses are not usually put upon oath, and they must be examined separately; nor is the accused, nor any person in his behalf, admitted to be present when the precognition is taken. Those who know any thing of the fact may be compelled to come forward: and for this purpose the judge grants a warrant to summon them, which, should they disobey, will be followed by a warrant of imprisonment until they comply. The precognition must be taken prior to the execution of the criminal letters; for, after that, communications between the prosecutor and the witnesses are improper.—*Bell's Law Dict.*

† By statute, 1581, c. 105; 1661, c. 21; 1695, c. 251.

‡ *Notour adultery*.—The law of Scotland makes a distinction between simple and notour adultery. The latter is, where issue is procreated between the adulterers; where they are known to live together at bed and board; or where they give scandal to the church, and are excommunicated for their obstinacy. By act of parliament, 1551, c. 20, notour adultery was punished by the loss of moveables; and by a posterior statute, 1563, c. 74, it was rendered capital. The punishment of simple adultery is arbitrary.—*Bell's Law Dict.*

§ 5 Geo. I., c. 27.

|| 1600, c. 12.

¶ 1st Geo. I., c. 5.



in their duty, which the statutes of later times have raised to the rank of felony, and punished with death. In like manner, it is only to the lords of justiciary, and never to any inferior judge, that the court of session remit in cases of forgery or falsehood; and in ancient practice, *the four pleas of the crown*, murder, robbery, rape, fire-raising : of the two former of which the sheriff is now deemed competent. This court too may appoint a sheriff depute, in the event of a vacancy, *pro tempore*, for the purpose of executing the Porteous rolls; and in virtue of their *nobile officium*, they assign aliment to prisoners; visit and approve of new gaols; assign particular places of keeping for prisoners, such as the castle of Edinburgh; liberate those whose lives are in danger from confinement: it authorizes, too, the edictal citation of vagabond or lawless and desperate persons, who have no established dwelling-place; and, in certain instances, reviews the sentences of inferior judges.

The lords of justiciary can also take special cognizance of malversations of public officers: they may summarily inflict a suitable censure on messengers and macers for negligence, extortion, or any other abuse in the citation of pannels,\* witnesses, or assizers; or in the taking and conveying prisoners on their warrants: on gaolers, for cruelties or oppression towards prisoners for crimes: on the magistrates of burghs, for the escape of such prisoners, or the insufficiency or unwholesomeness of their gaols: on sheriffs, for failure to attend the judges on their circuits, or inaccuracy in the execution of the Porteous rolls, or of warrants for the conveyance of criminals, or the like:† on the clerks of the court of justiciary, for exacting improper fees, or for gross omissions, blunders, or falsehoods in the act of their official duty.

At the same time it may not be uninteresting here to notice, that there

\* *Pannel*, in Scotch law, means the accused person in a criminal action from the time of his appearance.—*Bell's Law Dict.*

*Panel*, in English law, is used more particularly for a schedule or roll containing the names of such jurors as the sheriff returns to pass upon any trial; and the impannelling a jury is the entering their names by the sheriff into a panel or little schedule of parchment.—*Tomlin's Law Dict.*

† More particularly in regard to sheriffs, the judge on the southern circuit, in May, 1728, deprived the steward-substitute of Kirkcudbright of his office, and declared him incapable of holding it for the future, for an irregularity in the execution of the citation of the pannels in the Porteous roll. Again, in the spring of 1744, the sheriff-depute of Wigton having failed to attend the judges on their circuit, was ordered before the court at Edinburgh, and publicly reprimanded. Also in the spring of 1777, the judges on the northern circuit reported to the court, that the sheriff of Sutherland had failed to attend them, or to offer any excuse for his absence, for which he was reprimanded. Nay, on the 2d May, 1720, the judges on the western circuit found the sheriff of Wigton liable in a fine, and in damages to the party aggrieved, for the execution of an unjust and oppressive sentence; though, from the more recent judgment in the case of John Gray, sheriff-depute of Wigton, on the complaint of James Mackie, for refusing to receive or transmit the presentment of a criminal at his instance, it is to be inferred, that the sheriff is now entitled to the benefit of a trial in such cases, by an assize summoned on a libelled charge in common course. In short, all magistrates and public officers of every degree, are under the cognizance of the court of justiciary, not only for ordinary transgressions, but also for such as those into which they may have inadvertently fallen in their official capacity.

are certain privileges which attach to particular classes. For instance, Scottish peers, by the treaty of Union, enjoy all the privileges of British peers, except that of sitting in the house of lords in their own right, and especially the privilege of being tried as peers of Great Britain; consequently the rule in such cases is as follows: for high treason, petty treason, or misprision of treason, also for murder or any other felony, they are subject only to the judgment of their own order, assembled in the court of the lord high steward of Great Britain; towards which trial a bill must be found in terms of the statute\* by a grand jury of twelve men, who may be commoners, and before a special commission, which shall issue for that purpose. This privilege is inherent in all the individuals of the Scottish peerage, equally as in the sixteen peers who represent that order in the house of lords: and even for those members of the peerage, such as females, minors, and formerly papists,† who cannot be elected as representative peers. On the other hand, for all offences of a lower degree, the Scottish peers, like the British, are answerable in the ordinary courts of justice; and it is said also, that they are liable to attachment for such contempts of court as are of a high degree. For instance, James earl of Roseberry was outlawed in the court of justiciary on a libel‡ for forcement.§ And, in 1740, the earl of Morton was tried there on the

\* 6 Anne, c. 23.

† There is now, since passing "the Relief Bill," no distinction made between Protestant and Roman Catholic nobility.

‡ *Libel*, is used in Scotch law in different significations: it is applied to the form of the complaint, or the ground of the charge, on which either a civil or criminal prosecution takes place. It is also applied to scandal reduced into writing.

*Criminal libel*, whether in the form of an indictment or of criminal letters, is in a syllogistic form, in which the *major* proposition states the crime by its appellation, or by description, and that it is severely punishable. The *minor* proposition avers that the pannel has been guilty of this crime, and states the particulars of the deed which he has done. The *conclusion* is, that on conviction the pannel ought to suffer the pains of law.

*In a civil action*.—In the supreme civil court the libel is contained in letters passing under the signet, called a summons, which runs in the king's name, and is addressed to messengers at arms or sheriffs in that part. The pursuer's (or plaintiff's) title to insist in the action is stated; the ground of his action, and the conclusions by which justice is to be done to him, are put in the form in which the judgment is to be pronounced; and the whole closes with an order on the messenger to cite the defender to appear in court, and hear decree given against him, in terms of the conclusions of the libel, or to show cause on the contrary. Where the summons is raised in an inferior court, it does not run in the king's name, but in the judge's, and is directed to the officers of court, who by the will of the summons are ordered to cite the defender to appear, that he may hear decree given against him.

*Libel*.—Scandal reduced into writing and published or circulated, is of all others the most public and permanent, and ought therefore to be punished with greater severity than where the scandal is merely spoken: the *animus injurandi* is likewise more clearly proved. This offence may be the foundation of a criminal prosecution, or of a civil action for reparation, or of a combination of both actions. The offence consists either in turning the person into ridicule, or in blackening his moral character; and the punishment will be proportioned to the nature of the offence, and the malignity of the disposition which the offender may have discovered.—*Bell's Law Dict.*

§ *Deforcement*, is an act of contempt for the law, consisting of a violent opposition and hindrance to an officer of the law in the execution of his official duty. He must be a lawful officer, either a messenger-at-arms, or other officer to whom the execution of the diligence or other warrant or order may be legally intrusted, and the resistance must be offered to him while engaged either in the formal execution of the official act, or after he has assumed the official character, and is in immediate preparation (*in actu proximo*) to

same libel with other persons of lower rank, for the crimes of assault, oppression, and wrongful imprisonment.\*

enter on the formalities. The officer must notify who he is, and the purpose of his errand; and, if required, he must exhibit his warrant, although he need not part with it. A messenger-at-arms must also exhibit his blazon, and an inferior officer his baton or other badge of office; and in the attempt to execute his duty, he must have been himself proceeding in every other respect in a lawful manner. The obstruction offered must relate to the duty in which the officer is engaged; and it must be such an act of violence as to create either an actual impediment, or to excite a well grounded alarm for his personal safety. It must be an actual hinderance; for if the officer proceed and accomplish his object, the offence will amount to no more than an attempt to deforce, or an assault. All parties concerned in the resistance, whether the party against whom the proceeding is directed, or others, are guilty of the deforcement.

The statutes relating to the punishment of this offence, are 1531, c. 118, which provides that those convicted be punished by escheat of movables, the creditor being preferable for his debt, expenses and damages; 1587, c. 84, which provides that persons guilty of deforcement be prosecuted either civilly or criminally at the option of the pursuer, and that their *lives* and goods be at the king's will; and 1592, c. 150, which makes deforcing an officer of the law, or molesting him to the effusion of his blood, punishable by forfeiture of movables, one half to the king and the other to the pursuer. It does not appear, however, that under these statutes, any thing more than an arbitrary punishment has ever been inflicted. The ordinary punishment is fine and imprisonment, accompanied with damages to the private party. It might be inferred from the terms of the act 1592, c. 150, that the deforcement must be accompanied with effusion of the officer's blood, before it can be the ground of a prosecution *ad criminalem effectum*; but Hume makes it appear that this is not necessary.

The competent prosecutors for deforcement are either, 1st, the lord advocate; or, 2d, the messenger and the lord lyon, even without the concurrence of the party employer; or, 3d, the party employer. The competent court is either the courts of judiciary or of session; and of course inferior courts may also protect their officers from injury in the execution of their duty. The statutes referred to, recognize the jurisdiction of the court of session in cases of deforcement: but according to the present practice, when the action is brought into that court, the conclusion is not for the statutory pains, but merely a civil action for payment of the debt, with interest, damages, and expenses: although were an aggravated case to occur before the court of session, the court might no doubt remit it to the lord advocate, with a view to his instituting proceedings *ad vindictam publicam*.

The employer of the officer who has been deforced cannot be a witness even in a prosecution by the public prosecutor, unless he discharge his interest in the escheat, and for the recovery of his debt; and if the private party or the officer prosecute, no near relation of either seems to be admissible as a witness, even although such person may have been a subscribing witness to the execution of deforcement. It is therefore the duty of a messenger who anticipates resistance, to select witnesses who may be exposed to no such objections. It would appear, that although the defender be absolved (acquitted) in the criminal process, yet he may be pursued criminally, and the fact of the deforcement referred to his oath.

The deforcement or forcible resistance of revenue officers in the execution of their official duty, or such resistance offered to any of his majesty's naval or military forces, or to any other person or persons acting in aid of the revenue officers, is a capital crime. And when a person has been killed in the execution of his duty, if any individual shall be charged on oath before a justice of the peace or other competent person, with having been concerned in the resistance which led to the death, his majesty's counsel may issue an order on the person so charged, to surrender himself within sixty days; and if, after due publication of this order, in the manner pointed out by the act, he fail to do so, "he shall then be adjudged, deemed, and taken to be convicted of a capital crime, and shall suffer the pain of death and confiscation of movables, as in the case of a person found guilty of a capital crime, and under sentence for the same; and it shall be lawful for the court of judiciary, or the lords of judiciary, in their circuits in Scotland, to award execution against such offender, in such manner as if he had been found guilty and condemned in the said court of judiciary, or circuit courts respectively."—(52 Geo. III. c. 143.)—*Bell's Law Dict.*

\* *Wrongful imprisonment*, is committed under the statute of 1701, c. 6, by a judge or magistrate granting a warrant for commitment, in order to trial, *without cause expressed*, and on information not subscribed by the informer: by officers of the law receiving or detaining prisoners on such warrants—refusing to the prisoner a copy of the warrant of commitment—detaining him in close confinement above eight days after such commitment—not duly releasing him on bail, where he is committed in order to trial for a *bailable* offence—or transporting persons beyond seas, without their own consent, or on a lawful sentence. Other species of wrongful imprisonment, not falling under the statute, are punished arbitrarily at common law. The statutory punishment is a pecuniary fine, and payment of a

The sheriff has always had a principal charge in matters relative to the conservation of the peace, and the execution of the laws within his sheriffdom. With the foregoing exceptions, his jurisdiction reaches all transgressions against either our common or ancient statutory law, especially those punishable by arbitrary pains: all offences against the public peace, such as assault, affray, mobbing, having unlawful weapons, hame-sucken,\* incendiary letters, or violent threats of any sort. He executes the laws against profanity, lewdness, and excessive drinking; against Egyptians† and sorners,‡ vagabonds and sturdy beggars,§ resettlers of thieves or stolen goods, and keepers of loose and disorderly houses: those against destroyers of trees, and breakers of yards, cunningaries,|| and dovecots; and those against the users of false weights, forestallers, engrossers, and others of that description. He is competent in a trial of falsehood, to inflict an arbitrary punishment; of usury, so far as it relates to the treble penalties; of fraud, swindling, and breach of trust; of perjury, and subornation of perjury; of breaking prison, and the deforcement of his own officers, or those of the other inferior magistrates of the county; of bribery; or that kind of calumny which is the ground of a proper criminal action: at least there seems to be no sufficient reason for his not judging on those charges, as he certainly may of all malversations by the

sum of money *per diem* to the prisoner, both in proportion to his rank, and, moreover, incapacity for public trust. This act has been extended to private offenders also; and the penalties (which cannot be modified) may be sued for before the court of session, which has the sole cognizance of this crime. The right to prosecute under the statute prescribes in three years. Wrongous imprisonment founds also a civil action at common law for damages, at the instance of the injured party, against the magistrate or officer of the law, or other person who has done the wrong.—*Bell's Law Dict.*

\* *Hamesucken*, is the offence of feloniously beating or assaulting a person in his own house or dwelling place. In this sense, the house must be the place where the person resides. Unless it be adjoining to the house, a shop is not reckoned a man's dwelling house; but the garden of the house, or a court in front of it, will be held to be part of the house. A hired apartment in a lodging house will also be held, *quoad hoc*, to constitute a man's house, even although the assault be committed by the owner of the house; but an inn, or a friend's house, at which a person occasionally resides, is not in this sense a man's own house. Neither is a theatre to this effect counted an actor's dwelling place. A ship, which is the proper residence of the master or crew, is considered as a dwelling place. And aiming a blow, or offering to strike, though a blow be not actually given, has been held to infer the crime of hamesucken. This crime is punishable capitally.—*Bell's Law Dict.*

† *Egyptians*, gypsies. They are punishable in Scotland as rogues and vagabonds.

‡ *Sorners*. A person is guilty of sorning who takes meat and drink from others by force or menaces, without paying for it. This practice had formerly prevailed to such an extent in Scotland, that the most rigorous measures were necessary for its suppression, in so much that in the reign of Robert II., the offence was punishable with death; and at all times with the severest penalties.—*Bell's Law Dict.*

§ *Vagabonds and sturdy beggars*, were at one period classed as necessary, i. e. *insolventary servants*, such as indigent children, colliers, salters, and workmen who refused to serve at the legal rates. Various severe enactments were passed against them, under the descriptions of beggars, fortune-tellers, jugglers, minstrels, &c., and in some cases providing even capital punishments. The act 1696, c. 21, ratified all the preceding acts against them, besides there were two more modern acts, 4 Geo. I., c. 11, and 9 Geo. II., c. 5, which impose penalties. But now, vagrants are seldom taken up, or punished, unless where police regulations are enforced; or where they are entering a parish in the face of an advertised prohibition, or where they are committing, or in the habit and repute of committing petty delinquencies.—*Bell's Law Dict.*

|| *Cunningaries*, rabbit warrens.

officers, clerks, or other members of his own court in their official capacity. To this list may be added the crimes of bigamy; of clandestine marriage, when prosecuted for the pecuniary penalties; and simple adultery.\* The sheriff's powers likewise extend to the crime of rebellion, if there are no aggravating circumstances to incur transportation; of intrusion into churches; to the offence which is constituted by the episcopal clergy in Scotland neglecting to comply with the prescriptions of the toleration act,† and other relative acts of a later date.

His powers in cases inferring a capital punishment, are admitted by the infliction of such severe penalties against the gypsies, and which are committed to *all* inferior magistrates for execution: also in the crime of hamesucken; and in the two first of the four pleas of the crown, *viz.*, murder and robbery. In regard to murder, it was anciently a fixed rule, that if the murderer were taken *red-hand*, or *instantly*, the sheriff should see justice done on him "*within that sunne*," or within twenty-four hours after the deed: but the period of doing justice on the offender, was, long since, enlarged from one sun to three; and the statute of 1695, c. 4, provided generally with respect to "all capital crimes, wherein inferior criminal courts were hitherto restricted to try and execute within three suns, that this time shall hereafter be restricted to the trial and sentence only, but not to the time of execution, which is wisely left to the discretion of the judge, not exceeding nine days after sentence." That exception was also obviated by a later statute,‡ which debars any capital sentence from being put in execution, for *thirty days*, after date, if given south of the Forth, and for *forty days*, if given north of that river; nevertheless the trial might be carried through within three suns, although the manners and practice of later times have prevented so much precipitancy.

In cases of robbery, the exclusive right of the court of justiciary relates only to a proper robbery, or the taking of property by means of violence and fear applied to the person of the possessor. The sheriff is a competent judge in the trial for theft accompanied by violence of other sorts, as by breaking into shops or houses, forcing open repositories, or picking locks. It has always been allowed, that if a thief were taken *with the fang*, or with the booty on him, the sheriff might and ought to try and do justice on him immediately, although the injured party did not insist; and the same was held to be law in the case of a common or reputed thief. At least the sheriff's jurisdiction has been sustained over a common thief, though neither taken with *the fang*, nor accused at the instance of

\* For this last crime, the sheriff of Mid Lothian sentenced John Hudd to be flogged and banished the county, in March 1749.

† Having their chapels licensed, and taking the oaths to government.

‡ 11 Geo. I., c. 26.

the party injured, but of the procurator-fiscal alone; and there are several instances of the trial and capital conviction of a thief in the sheriff's court, on indictment for his majesty's interest.\*

**SHERIFF'S CIVIL JURISDICTION.**—In civil matters his jurisdiction is also very extensive, and in some respects supreme, before the institution of the court of session, when various causes which formerly came under his cognizance were gradually appropriated to that court, on account of their intricacy or importance.

In general, the sheriff judges in all personal actions upon contract, bond, bill, obligation, paction, verbal promise, or otherwise, to the greatest extent, whether against the debtor himself or his representatives, in actions of rent, forthcoming, multiplepoinding,† poinding of the ground,‡ adjudications of land, when they proceed on the renunciation of the apparent heir, and adjudications in implement; likewise in all possessory actions, such as removings, ejections, spulzies, &c.;§ and in short, in all civil

\* On 31st September, 1746, the sheriff of Mid Lothian passed sentence of death on Walter Stewart and three others, on their conviction of theft and housebreaking; the sheriff of Renfrewshire also sentenced Robert Lysle for theft in November 1753, which judgment was affirmed on trial by suspension. In January 1753, the sheriff of Forfarshire condemned a man to suffer death for housebreaking, which was also affirmed on a trial by suspension.

† *Multiplepoinding*, means double poinding, or double distress, and gives name to an action which may be brought by a person possessed of money or effects which are claimed by different persons pretending right thereto. Thus, where money due by a debtor has been arrested in his hands by the creditors of his creditor, or when the rents of an estate are claimed by different claimants on the estate, the arrester in either of those cases, may raise an action of multiplepoinding, calling the different parties who claim the fund *in medio*, and all others, to settle their respective claims judicially; and also to have it found, that (whoever may be entitled to the fund) the arrestee is liable only "in one single payment."

This action may be raised by the arrestee, or by the person on whom the claim is made; but it may also be raised in his name by any of the parties interested in the competition, without his consent, or even against it: and every person interested, though not made a party to it originally, may, in the course of that action, produce an interest in it, and plead the grounds on which he conceives himself to be entitled to a preference, and this is allowed in order to prevent a multiplicity of lawsuits.

The conclusions of the actions are, 1. That the raiser shall be liable in once and single payment. 2. That the parties may debate their respective claims, and he who has the best right to the subject *in medio*, may be preferred; and that the raiser shall be entitled to the expenses of raising the action and bringing the parties into court.

A decree in this action secures the raiser of the process, and enables him to pay with safety: it also settles the rights of the parties in competition: but it does not secure the person preferred against the claim of one who may have a preferable title, and who has not been made a party to the action of multiplepoinding.—*Hell's Law Dict.*

‡ *Poinding* is the Scotch law diligence, whereby the property of the debtor's moveables is transferred to the creditor using the diligence. Poinding is either *real* or *personal*; real poinding, or *poinding of the ground*, proceeds on debts which are *debita fundi*, and it affects the movables on the land to which the debt attaches; *personal poinding*, on the other hand, is used by the creditors in ordinary personal obligations, and affects the debtor's movable goods. There is a third description of attachment, which has also been termed poinding, whereby cattle found trespassing on the grounds of another, are detained until the owner of the cattle make satisfaction for the injury.—*Hell.*

§ *Spulzie*, corresponding to ejection and intrusion in heritage, may be defined the taking away of movable goods in the possession of another, against the declared will of the person, or without the order of the law. In consequence of this unlawful act, an action lies not only for restoring the goods, but for all the profits which it was possible for the owner to have made of the goods, as these profits shall be proved by his oath *in litem*, and which the sheriff may administer. This action must be brought within three years, in order to entitle the pursuer to the violent profits, and will be avoided by any probable ground of excuse, or by the spoliator's voluntary restitution *de recenti*. But an action for recovery of the goods carried

matters which are not by special law or custom appropriated to other courts. He is also competent to authenticate tutorial and curatorial inventories, and to seal and inspect the repositories of dying persons: to processes of cognition of debts and payments, and to the registration not only of bonds, contracts, or other deeds which bear a clause of registration in the books of any competent judge, but of protests on bills.

Besides the class of personal and other actions alluded to, the following diversity of suits and proceedings merit more particular notice.

I. A PETITORY ACTION OF MAILS AND DUTIES, is competent not only to a proprietor who has a feudal right perfected by sasine, but to a simple disponee or assignee, because a right to the rents is included virtually under a disposition of the lands, and consequently to an adjudger, and adjudication being a judicial disposition. And because the pursuer in this action founds upon *right*, not upon *possession*, he ought not only to make the possessors of the ground, but the proprietors or liferenters, who are in the civil possession, and from whom the natural possessors derive their right, parties to the suit: and he must support his claim by titles of property, or diligences, preferable to those in the person of his competitors. It is directed against the tenants and natural possessors of lands, for payment of the rent remaining due by them for past crops, and for the full rent of the land in all time coming.

II. A POSSESSORY ACTION OF MAILS AND DUTIES.—It is sufficient for the pursuer in this action to call the natural possessors as defenders, and in questions with tenants deriving right from himself, it is unnecessary to produce any other title than his own or his predecessor's sasine (saising): but if a third party should appear in the process, invested with a sasine, to defend the possession of the present possessors, it will be incumbent upon the pursuer to show that he himself, his predecessors, and authors, have been in possession of the rents for seven years immediately preceding, upon a sasine or lease, and that thereby he has the benefit of a possessory judgment upon such sasine or lease; which judgment has this effect, that a person though claiming under a right preferable to that of the possessor, cannot attain the possession until he shall, in a former process of reduction, get his competitor's title declared void. In both these actions, the quinquennial prescription\* forms an exception in favour of tenants, who are not liable for arrears of rent after five years from the date of their removal from the lands.

III. AN ACTION OF POINDING THE GROUND.—Any person having a debt secured on land, or as it is called a *debitum fundi*, whether the security be constituted by law or paction, has a right of action, of *poinding the ground*, or distraining the stock, crop, and goods on the burdened land, to recover his payment, even though the original debtor should have been divested of the property in favour of a singular successor, after granting such security. It is therefore competent to an annual-renter, for the arrears of interest due upon his infeftment; to a superior for his feu duties; and in general to all creditors in debts, which make a real burden upon the lands. It is however incumbent on the pursuer of such actions, not only to make the tenants and possessors parties thereto, but also the proprietor who has interest, to show cause why the diligence† ought not to proceed. Where, then, the lands are held in wadset, it is the wadsetter;‡ who as proprietor *ad interim*, must be called, and not the

off illegally, and for ordinary damages, may be brought at any time within forty years, not against the spoliator alone, but against all abettors, who are liable *singuli in solidum*, and against his heirs, who are liable in violent profits also, if litis-contestation took place with the ancestor. The spulzied property may be evicted from *bona fide* purchasers, for spulzie *inurit labem realem*.—*Hell's Law Dict.*

\* Introduced by the act 1696, c. 9.

† *Diligence*.—This term is used in three different and unconnected meanings: 1. It is with propriety used to express the nature and extent of the diligence and attention incumbent on the parties to a contract, with regard to the case of the subject matter of the contract. 2. It means the warrants issued by courts for enforcing the attendance of witnesses, or the production of writings. And, 3. The term is applied generally to the process of law, by which persons, lands, or effects, are attached in execution, or in security for debt.—*Hell's Law Dict.*

‡ *Wadset, Wadsetter*.—Wadset is the conveyance of lands in pledge or in satisfaction of a debt or

reverser. When decree is obtained in this action, and letters of poinding raised thereon, it is unnecessary to give the tenants a previous charge, because nothing is decreed against them: neither is it necessary to charge the proprietor's apparent heir to enter, because it is not the object of the action to make him personally liable, the lands and not the heir being principally considered. The defenders not being made parties, as debtors to the pursuer but as having interest in the lands affected by the diligence, the letters of poinding raised thereon are effectual for recovering payment, not only of the interest due at issuing the letters, but thereafter as long as the pursuer is alive, though both the proprietors and the natural possessors cited in the action as defenders, should be dead or removed from the lands. Nothing, however, can be poinded upon such diligence, but what belongs either to the proprietor of the ground or his tenants: goods, therefore, brought upon the lands by strangers are not subject to it.

IV. Anciently, when a lease was about to expire, the owner of the ground verbally intimated to the tenant to remove at the next term of Whitsunday; and previous to that term he appeared before the tenant's door with a wand in his hand, which he broke, as a symbol of the dissolution of the tacit relocation betwixt them. If the tenant did not remove voluntarily, the landlord expelled him, on the second day after the term *brevi manu*, or at least laid out some of his goods to complete the solemnity of removing. Hence arose many quarrels, violences, and breaches of the peace, to remedy which a special form of warning was enacted,\* and the whole order of removing must be used forty days before Whitsunday, though the term of the *ick* should be Martinmas or Candlemas; because as Whitsunday then was, and still is, the ordinary term of entry over the greatest part of Scotland, tenants would not otherwise have had a reasonable time to provide themselves in another farm. The forty days are so computed as not to include the term day, nor the day on which the warning is issued: and by act of parliament,† the legal term of removing is declared to be the fifteenth day of May. The ceremony proceeds on the landlord's precept, which must be executed against the tenant personally, or at his dwelling place: also on the grounds of the lands, and published at the parish church, by reading the same audibly at the most patent door, immediately after the morning service. But by an act of sederunt of the lords of council and session,‡ it is declared that it shall be lawful to any heritor in his option, either to use the order prescribed by the above act (1555,) and thereupon to pursue a removing and ejection, or to bring his action of removing before the judge ordinary: and such action being called before the ordinary at least forty days before the term of Whitsunday in the year in which the tenant's lease expires; and when the action is called in absence, decree of removing is immediately pronounced: but if appearance be made for the tenant, he will be heard in defence, but he must, *ante omnia*, find security for the violent profits. When decree is pronounced and becomes final, a precept will be issued, on which, within forty-eight hours, the tenant may be removed. A landlord's title to prosecute a removal, whether good or bad, cannot be questioned by the tenant who derives his right from him: but if the proprietor is to insist against tenants or possessors who derive their right from others, sasine is a necessary title in removing, unless the pursuer's right is founded on the terce or courtesy, these being legal rights perfected without sasine. A sasine is of itself a sufficient title for removing possessors who cannot show a better; but if the defenders have a real right in the lands, the sasine is not held as sufficient, without producing the relative charter; and the pursuer must stand infeft, not only before the action of removing is commenced, but also before the date of the precept of warning. Nevertheless, Mr Erskine is of opinion, that a bare disposition to land carrying an express right to mails and duties, entitles the dispositive to remove tenants as a necessary consequence. In either case, a co-proprietor, or one who has only a joint interest in a landed estate, *pro indiviso*, cannot individually remove tenants, as in the case of joint purchasers, co-heiresses, and of a widow entitled to a terce. The tacksman of a colliery may be summarily sued to remove without any previous warning.

obligation, with a reserved power to the debtor to recover his lands, on payment or performance. During the enforcement of the laws against usury, a wadset was the usual expedient fallen upon by a party wishing to borrow. The lender was called the *wadsetter*, and the borrower the *reverser*.—*Beil.*

\* 1555, c. 30.

† 1690, c. 30.

‡ 14th December, 1756.



The rules laid down by the act of sederunt, are so simple and complete, that they answer all the purposes of the old regulations, and will on that account be adopted in all removings where there is no obligation in the lease requiring the tenant to remove, in which case the act provides a remedy for enforcing the removing, equally simple and certain in the intimation which it gives to the tenant. It declares that an heritor, where the tenant is bound by the lease to remove, may raise letters of horning\* on the tack (lease); and having charged the tenant on these letters *forty days* preceding the term of Whitsunday in the same year in which he is to remove, the sheriff on production of the tack and horning, must eject the tenant within six days after the term of removal. The act of sederunt further declares, that where a tack is assigned, and the assignation not intimated by an instrument, or when the lands are sublet in whole or in part to subtenants, the execution of such horning, or where process of removing and decreet is obtained, or where warning in terms of the act of 1555, is used against the principal or original tackman, the same shall be effectual against the assignees or subtenants: nor is the effect of a warning lost either by the death of the landlord or tenant. The statute expresses, "lands, mills, fishings, and possessions whatsoever;" and it has been found, that a warning to remove from fishings, must be given within the same period as for lands; but it is not applicable to houses, though in the country, it being sufficient if the warning is given forty days before the *id.*, whether Whitsunday or Martinmas; but if any portion of land is attached to the house, the warning must be precisely in terms of the statute.

An act of parliament† ordains, "that all tenants and cottars, shall preserve and secure all growing wood and planting that is upon the ground they possess: that none of it shall be cut, broken, or pulled up by the roots, or the bark peeled off any tree, and that under the pain to be exacted by their master alienarily, of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above that age: the tenant being held liable for his wife, children, and servants, or any other within his family that shall contravene this act:" therefore an action is competent before the judge ordinary for these penalties, if incurred. And the following provisions of a previous statute merit attention, and may be enforced by the sheriff: "that hereafter no person whatever shall cut, break, or pull up any tree, or peel the bark off any tree, under the pain of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree above that age: and that the havers and users of the timber of any tree that shall be so cut, broken, or pulled up, shall be liable to the same penalty, except he can produce the person from whom he got it; and if the person that shall be so convicted, be unable to pay the fine, then he shall be decreed to work a day for each half merk contained in the said fine, to the heritor whose planting shall be so cut or broken;"—"and that no person shall break down or fill up any ditch, hedge, or dyke, whereby ground is enclosed; and shall not leap, or suffer their horses, milt, or sheep, to go over any ditch, hedge, or dyke, under the pain of ten pounds Scots, *toties quoties*, the half thereof to be applied to the heritor, and the other half for the mending and repairing of bridges and highways within the parish, at the sight of the sheriff, steward, or justices of peace, before whom the contraveners shall be pursued."‡ Farther, "all liferenters, cottars, and other possessors of lands or houses, shall cause herd their horses,

\* *Letters of horning*, are letters running in the king's name, and passing his signet. They are directed to messengers at arms as sheriffs in that part, who are ordered to charge the person against whom the letters are directed, to pay or perform in terms of the will of the letters, which must be consistent with the warrant on which the letters proceed. The warrant on which letters of horning proceed, is either the decree of the court of session, or of magistrates of burghs, sheriffs, stewards, admirals, commissaries, or the commission of tithes, and in some cases of justices of the peace. But where the decree of an inferior court is the warrant, a bill must be presented to the bill chamber of the court of session, stating the nature of the decree, and terms of the decretniture, and praying warrant for letters of horning and poiding, which is always granted, so that, properly speaking, these letters pass on the warrants of the court of session only. By special statute, letters of horning are authorized to pass on bills of exchange, the protests on which have been recorded in any competent court. These letters narrate the ground of debt, and the terms of the decree, by which the judge orders payment or performance to be made; and in the will the officers are ordered to command and charge the debtor to pay or perform in terms of the warrant stated in the recital, within fifteen days, except the debtor resides within Orkney or Zetland, in which case the days of charge are forty days. But under the acts of 1681, c. 20, and 1691, c. 36, hornings on bills of exchange may proceed on a charge of six days.—*Beil.*

† 1698, c. 16.

‡ 1685, c. 39.

molt, sheep, swine, and goats, the whole year, as well in winter as in summer, and in the night-time shall cause keep the same in houses, folds, or enclosures, that they might not eat or destroy their neighbours' grounds, woods, hedges, or planting: certifying such as contravene, that they shall pay half a merk, *toties quoties*, for every beast they have going on their neighbours' grounds, by and attour the damage done to the grass or planting: and declaring that it shall be lawful for the heritor or possessor of the ground to detain the said beasts until he be paid of the said half merk for each beast found upon the ground, and of his expenses in keeping the same."\* It is therefore customary for the sufferer to prosecute the owner of the cattle for the penalties and damages. The possessor of the ground on which the cattle were seized might, by the most ancient practice carry them off *brevi manu*, without a sentence, to any house or field belonging to himself, and detain them for twenty-four hours. If within that space the owner did not appear and claim them, the seizer might insist on a valuation by the stated baronial appraisers, of the damage done, including the maintenance of the cattle, and might retain one or more in proportion to the appraisement, restoring the rest to the owner. The poulder or seizer must enclose and feed the cattle, and besides give the owner due notice, otherwise he incurs the pains of a spulzie.

When lands are astricted or thirled to a particular mill, to which the possessor must carry the grain produced on the astricted lands to be ground, on payment of such duties as are either expressed or implied in the constitution of the right, the mill is called the dominant tenement, and the astricted lands the servient: or the lands are called the *thirl* or the *sucken*, and the persons subjected to this *thirl* or *sucken*, the *suckeners*. When the suckeners abstract or withdraw their grain from the mill, its proprietor, or his tenant, have action against them for the value of the abstracted multures, including sequels or servants' dues, in which action the tenants guilty of the abstraction must not only be called as defenders, but also the proprietor of the astricted lands (if he is not also the proprietor of the mill and thirlage) for his interest; because, if he is not made a party, the decree will not bar him from an immunity from the thirlage by prescription.

Besides the tenant's personal obligation in a lease, the landlord has in security for his rent, a real right in the fruits of the ground, and in the cattle either reared on it, or purchased by the tenant. The corn or other crops are hypothecated for the rent of the year in which they were grown, and the cattle for every year successively, which last right subsists for three months after the last conventional term of payment; and when the cattle have been carried off before Candlemas and Lammas respectively, the landlord must bring his action against the poulder before the expiry of three months, in order to preserve his claim. This right too, entitles the landlord to recover all corns carried off from the tenant, either by legal diligence or voluntary purchase, and even from a purchaser in a public market, if there is ground to suspect collusion; only the crop of the present year cannot be hypothecated for the rent of the last year; but all the corn on the farm at the time, may be retained as a security for the rent of the current crop. Accordingly, when a creditor pouds a tenant's effects, before the term for payment of his rent, he must either consign or find security for, the rent of the current year: but if after the term, it is obligatory either to pay the rent, or leave untouched corn for its value. At the same time, if the landlord suspects either the tenant's circumstances or his management, he may by sequestration make his right, which was before general upon the whole stock, special upon any individual; thus imposing a legal *curtus* against the sale or transference of any part, and when the term of payment arrives, a warrant to sell will be obtained for recovery of the rent. All these objects are accomplished by a petition or summary application, expressive of the special facts of the case, with the appropriate conclusion.

Where lands are sublet, the right of hypothec will be affected by the subtenant's situation. For instance, if there has been a power in the lease to sublet, or if the landlord has known and consented either tacitly or by agreement to the sublease, payment by the subtenant to the principal, will exempt his crop from his landlord's claim. A similar hypothec exists over furniture for house rents, the goods in shops, instruments of manufacture, &c., in mills,

\* James VII., c. 11.

warehouses, and the like, and which, though necessarily general, may also be made special by a sequestration, although it cannot any way affect purchasers in a shop whilst it is kept open.

On application to the sheriff, he can stop by interdict any one from encroaching on the property of another in any shape, till the matter has been judicially inquired into; and if it shall appear from a visitation by the judge, or the report of surveyors or inspectors named for the purpose, that an encroachment has been made, the sheriff may ordain such to be removed or remedied, and prohibit or discharge the aggressor from a repetition.

By the edict *naviæ, cauponæ, stabularii*, of the Roman prætor, which with some small variation is adopted by the law of Scotland, an obligation is induced by a traveller's entering into an inn, ship, or stable, and there depositing his goods, or putting up his horses, by which the innkeeper, shipmaster, or stabler, is bound to preserve for the owner whatever is intrusted to his care. It extends to vintners in burghs, householders who take in lodgers, carriers, and to proprietors of stage coaches. This obligation is the creature of the law itself; for the bare act of receiving the goods, without any covenant or agreement, lays them under it; but it is limited to what is done in the ship, inn, or stable; for if the goods be stolen or damaged, after they are carried off from thence, and so no longer under the depositary's eye, he is no farther liable. The action is usually laid for the restitution or payment of the value, as it may be established by the pursuer's oath *in litem*, with damages and expenses.

The law holds that a perpetual obligation exists on parents to maintain and educate their children, and reciprocally on children to maintain their indigent parents. A similar obligation extends to the eldest son, who, as representing the father, must aliment his younger brothers and sisters; and it is even extended to grandsons and *vice versa*. These obligations may be enforced by an ordinary action at common law.

Collation is the act of throwing into one mass, divisible among those concerned, either the heritable or movable estates of the deceased, and takes place either in settling betwixt the heir and the executors, or amongst younger children. In the first case, the right takes place only where the heir, by seniority or sex, excludes others who are equally near in relationship from the heritage; for instance, where the eldest son is heir, and the younger sons are executors, or where a son is heir and his sisters the executrixes: the same rule holds also in collateral succession. But where the heir is the nearest relation to the deceased, he is both heir and executor; as where there is the eldest son and grandchildren, or his nephews or nieces, the eldest son is both heir and executor, for there is no right of representation in movable succession, and therefore the children do not succeed to their parents' shares. It is then in the former case where the heir and executors are of equal relationship to the deceased, that collation can take place; and it consists in the heir's blending his heritage with the movable succession, (a privilege conferred upon him by law), and sharing both estates equally with the executors. For the accomplishment of this object, when the intended heir raises a sort of declaratory action, which is competent before the sheriff, for ascertaining that he is entitled to collate; for exhibition of all grounds of debt and security of the executory funds, for a statement of the intromissions and a general accounting. Mr Erskine is of opinion, that a grandson ought to possess all his father's privileges in this respect, and consequently the right of collation with his uncles; but by a case decided in 1787, it has been found otherwise. Again, collation amongst the younger children takes place only according to the *legitim*; and when it falls to be divided amongst the children, if any of them during the lifetime of their father, or by his bonds of provision, has drawn a share of his effects, it must be accounted for before that child can claim any portion of the *legitim*, unless the father's purpose of bestowing that provision upon the child as a *precipuum*, is demonstrable. A similar description of action is necessary for effecting this end, at the instance of the party claiming the benefit against the others.

By law, the heir and executor are liable to the creditors of the defunct in payment of his just debts; but the executor is bound to relieve the heir of the personal debts, in so far as the executory or movable estate extends; and should the executor have paid an heritable debt, he has the like relief against the heir. Hence actions on these heads occasionally occur,

and which may be brought, before making payment. This reciprocal relief is not affected by the settlement containing a clause burthening the heir or executor with debts, such being understood not to confound or alter the rights of heir or executor. Where an heir intromits with the movable estate of the ancestor, without making up a right by confirmation upon inventory, he is said to incur a passive title of *vitious* intromission, (the intromission with the heritage or rents thereof, being termed *gestio pro hærede*), the effect of which is to render him liable for the debts of the ancestor universally; and its consequences are extended to every intromission, though he be a stranger merely: however, it is put an end to by recent confirmation, inferring an intention to account, which removes the vitiosity, and saves him from being liable beyond the amount of his intromissions. This right is only competent to creditors, and not to the heirs of the deceased, nor to legatees. Actions of this sort are not infrequent before the sheriff.

An account of the office of commissary, with which the sheriffs are now vested, will be found under the title *Commissary Court*.

**SHERIFF'S MINISTERIAL DUTIES.**—By virtue of their ministerial prerogative, it is the duty of sheriffs to execute all writs issued by the court of exchequer, to levy for the king's use, the escheats of those who are denounced rebels, and the blanch and feu rents, casualties of superiority, and other duties payable to the crown, for which they must account in exchequer,\* and in general to attend to all matters in which the interest of the crown is concerned within their county; they return juries for the trial of causes before the judiciary and exchequer, and also for civil causes before the jury court. Since the Union, writs for the election of members of parliament are directed to the sheriffs, and in which they are obliged to return the member's name elected, to the crown office, whence they issued. It is likewise their duty to strike the fiars annually; that is, they fix the prices of grain of the growth of the several counties, for the preceding crop in the month of February by a jury, and which become the regulating and legal prices by which a variety of covenants and transactions are governed.

All sheriffs, by themselves or their deputies, and other officers and subjects in Scotland, are by act† obliged to be obedient to, and attendant upon the court of exchequer, and are subject to such penalties for neglect of duty, or for any contempt or disobedience, as may be imposed by the court. And the same act empowers the barons to take and pass the accounts of all sheriffs and other officers in Scotland, who have the execution of any process issuing out of the said courts, for the levying of any money for the crown, and to charge and discharge them in such manner as the said sheriffs and officers, before the Union, were used to be charged and discharged. Of the various exchequer writs, which fall to be executed by sheriffs, the writ of extent, by which debts to the crown are made effectual, merits the most especial consideration, from its having only been introduced into Scotland at the Union, and by which

\* Act 1663, c. 15.

† 6 Anne, c. 20.

the personal estate of a debtor is often carried off to the material disappointment of his other lawful creditors. By the treaty of Union the English revenue laws were extended to Scotland. In consequence, the court of exchequer was then instituted,\* and the forms of recognizance and other securities for the crown debts, and of suits and prosecutions therein directed to be regulated according to the English form. His majesty's prerogative entitles him in Scotland, at common law, to the same preference over the execution of the subject as in England, wherever they stand in equal degree, and therefore the king's execution carries all property of which his majesty's debtor is not at the time completely divested by voluntary conveyance, or against which execution by a subject has not been so completed as to transfer the property: but by statute,† this general rule was so far restricted that, "if any suit be commenced or taken, or any process hereafter awarded for the king, for recovering of any of the king's debts, then the same suit and process shall be preferred before any person or persons, and the king shall have first execution against any defendants, and for his said effects, before any other person; *so always that the king's said suit be taken and commenced, or a process be awarded for the said debt at the suit of the king, before judgment be given for the said person or persons:*" consequently, a judgment obtained by the subject in a court of law, before the suit of the crown is commenced, or process for the crown debt be awarded, was declared to be exclusive of the crown. When there are more extents than one for different duties, they are ranked according to their *testes*. Under debts to the crown are to be classed not only taxes, including arrears, but penalties, double duties, and engagements of security for collectors: but in this latter case the remedy is an extent in aid, which cannot be taken out against the surety while the principal is solvent. The excise statutes provide in certain cases that the materials and utensils employed in manufactures, shall be charged with the duties, into whose hands soever they may have come, or by whatever conveyance: and in such cases, the effects remain under a lien to the crown, even after assignment or execution, and independently entirely of priority in proceedings; and the lien even covers double duties, when they are made the penalty for being in arrear. This prerogative is so broad, that debts due by the debtors of the debtor, and even by those who are indebted to them, may be taken under it: and even a debtor to the crown who has a debt due to him by another, may, by extent, gain for himself a preference over the other creditors of his debtor, although the crown is in no danger from his own insolvency. But the statute of Anne before noticed, makes an exception of real estates in

\* 3 Anne, c. 26.

† 23 Henry VIII. c. 39.

Scotland, in these terms: "Provided that no debt to the crown in Scotland shall affect any real estate in Scotland, further or otherwise than such real estate may be subject thereto by the laws of Scotland; and the laws of Scotland shall in all such cases hold place," and "the validity and preference of the title of the crown to any honours, manors, lands, or hereditaments, or to casualties belonging to the crown, shall continue to be tried in the court of session by the law and practice of Scotland, and not otherwise." The legitimate inference then is, that the crown's preference does not operate against lands, nor against all the proper heritable estate, rents, annuities, &c., which by the law of Scotland are adjudgable. And it may be held as fixed, that the crown can attain no preference over the heritable estate by any sort of diligence, more than a subject, and will be excluded from ranking on the heritable estate altogether, unless proper diligence for attaching that estate is used. Hence it is a governing principle, that the crown has no preference after a complete transfer and divestment of the property, whether voluntary or judicial; unless in the particular cases of excise liens on the materials and utensils, under special statutes. Again, respecting the king's preference to the hypothec of the landlord for rent, it may be considered as fixed, that this general right of the landlord, however preferable to the diligence of subjects, is of no avail against the crown, and that even after sequestration of a tenant's effects, and a warrant of sale, the proceedings on the part of the crown create a preference over the effects still unsold; nay the court of exchequer has carried this a little farther, and held that the crown has a preference even after the goods have been sold.

**SHERIFFS TO STRIKE THE FIARS.**—The sheriffs and stewards in their respective jurisdictions have been in the practice for time immemorial to strike the fiars in February; that is, to fix the price of grain for the preceding crop, by which all bargains are regulated, where parties have not fixed any price, or who have expressly referred to the fiars price. The object is to ascertain the correct medium price; and the mode of procedure is regulated by a very special and explicit act of sederunt of the court of session, in these terms:—

21st December, 1723.—The lords of council and session considering that the use of the sheriff's fiars is to liquidate the price of victual in divers processes that come before them and the subordinate judicatories, and that there is a general complaint that the said fiars are struck and given out by the sheriffs without due care and inquiry into the current and just prices; and that when some sheriffs proceed in striking the fiars by way of inquest, yet they get not sufficient evidence to the jury; and that other sheriffs proceed arbitrarily and without any inquest, and some of them entirely neglect to strike fiars, which creates great uncertainty, and much delay and expense in the administration of justice: therefore the said lords do hereby appoint and require the sheriffs of Scotland, and their deputies, yearly, betwixt the 4th and 20th February, to summon before them a competent number of persons living within the sherrifdom, who have knowledge and experience of the prices and trade of victual in those bounds, and from them to choose fifteen men, whereof not fewer than eight

shall be heritors, to pass upon the inquest, and return their verdict on the evidence underwritten, or their own proper knowledge, concerning the fiars of the preceding crops of every kind of victual of the product of that sheriffdom, and the said sheriffs and their deputies shall, at the same time and place unto which the jury is called, also summon the properest witnesses, and adduce them and all other good evidence before the said jury, concerning the prices at which the several sorts of victual have been bought and sold, especially since the 1st November immediately preceding, until that day; and also concerning the other good grounds and arguments from whence it may rationally be concluded, by men of skill and experience, what ought to be established as the just fiar prices for the said crop; for any person then present, may in open court and not otherwise, and observing due order and respect, offer information to the jury concerning the premises, and concerning the evidence adduced, or that might be adduced before them; and if it appear to the sheriff and his deputies, or to the jury, that the adducing of proper evidence has been any way disappointed, or that the evidence adduced is defective, the said sheriff or his deputies shall adjourn the jury till a certain and proper day, that sufficient evidence may then be laid before them; and the jury being duly sworn before the evidence be entered upon, when the same is concluded, the said jury shall be, and remain enclosed, till they have finished their verdict, which they return signed by their chancellor and clerk, to the sheriff or his deputies, at the time and place fixed for that purpose by the said sheriff or his deputies where the jury was enclosed; and the said sheriff or his deputies shall, on or before the 1st day of March, pronounce and give forth sentence according to the said verdict, determining and fixing the fiar prices for the crop proceeding of each kind of victual of the product of the sheriffdom. And farther, in such shires where the use and custom has been, or where it now may be found needful and convenient to strike different fiars, according to the different qualities of the several sorts of victual, the said use, which experience has shown to be good and profitable, shall be continued, or introduced by the several sheriffs respectively; and the said different fiars shall be fixed and determined as the other fiars in manner above mentioned: all which fiars the said sheriff or his deputies shall forthwith record in their books, and their clerks shall give extracts thereof to any person who asks the same, and that for payment of seven shillings Scots money, and no more. And the said lords of council and session, that the administration of justice in the court of session, and subordinate courts, may no longer suffer by the negligence and defects above mentioned, do hereby appoint and strictly require the sheriffs and their deputies and clerks, punctually to observe the premises, and that the same be also observed by the stewards of Kirkcudbright and of Orkney and Zetland, and their deputies and clerks: and that the said sheriffs and stewards and their deputies and clerks, do begin the observation thereof in February next, as they regard and will be answerable for the due execution of their offices.

**SHERIFF TO READ RIOT ACT.**—Another branch of the sheriff's ministerial duties, is to read the riot act: \* this duty is also imposed on justices of the peace and other magistrates. The act provides, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and the sheriff, under sheriff, a justice of the peace, or head officer of a town, shall command them to disperse, and they contemn his orders, and continue for *one hour* afterwards, the offenders shall *suffer death*. A constable or peace officer is not vested with this power. The act specifies a form of proclamation, but as it may be made in words "like in effect," any general command is held sufficient; such as, "Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first

\* 1 Geo. I., c. 5.

year of king George I. for preventing tumult and riotous assemblies." GOD SAVE THE KING.

If the persons so unlawfully assembled do not disperse within the hour, any justice, sheriff, mayor, &c., may seize such persons, and carry them before a justice of the peace, and are empowered to command all his majesty's subjects of age and ability to assist. It is a sufficient ground for the interposition of the magistrates, that such features of force, agitation, and disorder, as amount to a disturbance of the public peace, appear in the assembly; and should they proceed to any invasion of property or person, they may be forcibly resisted, suppressed, and taken on the spot, even by the individuals assailed and their assistants, without reading the act or allowing any interval of time; or should the reading of the proclamation be opposed by force, the opposer shall suffer death; and all persons to whom such proclamation *ought to have been made*, knowing of such obstruction and not dispersing, shall also suffer death. Officers and their assistants killing any of the mob in the prosecution of the means to suppress the riot, are indemnified: and if any person so riotously assembled, begin to pull down any building, he is liable to suffer death; though it has been found that destroying the exterior ornaments, or even forcing open doors or windows to get access, does not of itself constitute the crime. The county, city, or burgh, where such disorders shall happen, are made answerable for the damages sustained by the owners.

SUMMARY.—The office and duty of a sheriff may be summed up with the descriptive characteristics given by Skene, in his exposition of legal technicalities. That learned antiquarian quaintly states: "and to the effect they may the better exerce their office, and do justice to every person as effeirs, they sud be good, sufficient, and qualified men, as is statute be king David II., 6th November 1357. In ilk schireffdome they sud doe justice to the kinge's lieges, hauld courtes in lauchfull time, and continew the samine according to law, swa as that actiones and process begun and intended before them sall na waies be delayed throw their negligence, fraude, or malice:\* and sud doe justice and full law als weil to puire as to rich, under all paine and charge that may follow. And in brief, all schireffes and uther ordinar judges, their deputes, and clerkes,† suld knawe, and understand the lawes of this realme and actes of parliament,‡ quhair of the execution is committed to their charge, quhilk they sud cause be execute without delay. And sud not only be qualified in judgment and knowledge to minister justice, but also sud have sufficiently of their owen in landes, gudes, and gear, quharin they may be punished, being found culpable in execution of their office."§

\* Statute, Robert III. † James I. c. 45. ‡ James VI., c. 124. § James I., c. 6.



**BURGH COURTS.**—Burgh courts are possessed of certain jurisdictions by common law as well as by statute. At common law, the magistrates of a burgh are held to possess the same power within their territory as the sheriff within his county. Their criminal jurisdiction extends to petty riots, but none have jurisdiction in blood-wits, except those of Edinburgh, Stirling, and Perth. The provost of Edinburgh is named in all commissions of the peace. The lord provost, magistrates, and town council of Edinburgh, before the late burgh reform had, and indeed still continue to possess, many valuable powers, privileges, and immunities, conferred on them at different times, and by successive sovereigns. They are judges competent in all personal actions upon contract, bond, bill, obligation, paction, verbal promise, or otherwise, to the greatest extent, whether the process be brought against the debtor himself or his representatives in actions of rent, forthcoming, multiplepoinding, and others of a similar nature. They are competent to the authenticating of tutorial and curatorial inventories, in processes of cognition of debt and payment, and to the registration not only of bonds, contracts, or other deeds which bear a clause of registration in the books of any judge competent, but of protests upon bills. They are also competent judges in possessory actions, as removings within burgh, spuilzies, ejections, &c., and in all briefes issuing out of the court of chancery directed to the judge-ordinary; and they have cumulative jurisdiction with the high-admiral, in maritime questions within the port of Leith. Their private jurisdiction as bailies of a royal burgh, is to judge upon the application of indigent prisoners for the benefit of the act of grace, also of prisoners for liberation on account of sickness; in an arrestment of strangers, till they find security for meat, drink, and clothes, furnished to them by the inhabitants of the burgh; and in all matters of police within the burgh. They also exercise a summary civil jurisdiction to the highest amount, in actions at the instance of drovers, or the like, against butchers, for payment of the price of cattle bought at the House of Muir, or West Port for ready money. But this action is only competent when brought within forty-eight days after the sale. And by special statute a power is given them to value and sell ruinous houses, when the proprietors refuse to rebuild or repair them. In virtue of the foresaid royal grants they held justice of peace courts, and judged in all matters within the city and liberties competent to the county justices of the peace.\*

\* View of the Office of Sheriff in Scotland, by Robert Clark.—Boyd's Judicial Proceedings before the High Court of Admiralty, the Supreme Commissary Court, and the Sheriff, Bailie, Dean of Guild, Justices of Peace, Baron, and Small Debt Courts in Scotland, by A. Frazer, S. S. C.—Bell's Law Dictionary.—Drummond's Proceedings.

The magistrates, &c. of a burgh were formerly elected according to the particular set or act of that burgh, but their election is now regulated by the following act, entitled

**AN ACT TO ALTER AND AMEND THE LAWS FOR THE ELECTION OF THE MAGISTRATES AND COUNCILS OF THE ROYAL BURGHS IN SCOTLAND.**—[23rd August, 1833.]

WHEREAS the right of electing the common councils and magistrates of the royal burghs of Scotland appears to have been originally in certain large classes of the inhabitants of such burghs, by the abrogation of which ancient and wholesome usage much loss, inconvenience, and discontent have been occasioned, and still exist; for redress and prevention whereof, it is expedient that an immediate remedy be applied, and that the close system of election now practised in these burghs should be forthwith abolished, and their ancient free constitutions substantially restored; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the period when this act shall come into operation, the right of electing the town councils in all such burghs respectively (except in those contained in schedule F,) shall be in and belong to all such persons, and to such only, (except as hereinafter excepted,) as are or shall be qualified, as owners or occupants of premises within the royalty, whether original or extended, of any such burgh, to vote in the election of a member of parliament for such burgh, by virtue of an act passed in the second and third year of the reign of his majesty king William the Fourth, intituled "An act to amend the representation of the people in Scotland," and as are duly registered as such voters in the registers by the said recited act appointed to be kept, and also in all such persons who are possessed of the qualification described in the said recited act, in respect of the property or occupancy of any house or other subject therein described of the value thereby required, within the royalty of any royal burgh not now entitled to send members to parliament: provided always, that all such electors who may be qualified as hereinbefore provided shall have resided for six calendar months next previous to the last day of June in this and all future years within the royalty of such burgh, or within seven statute miles of some part thereof: provided also, that no person shall be entitled to vote who has been in the receipt of parochial relief, or who has been a pensioner of any corporation, within twelve months of any such annual election, or for any burgh of which he may have been town clerk at the time of such election, or at making up the list or roll of electors with a view to such election,

II. Every person claiming to be entitled to vote in the election of the council of any royal burgh not now entitled to send members to parliament, shall, on or before the twentieth day of September in the present, and the twenty-first day of July in any succeeding year, give in his claim, subscribed by himself or his agent, to the town clerk of such burgh, such claim being in the form, as nearly as may be, of the first part of schedule A, together with any written title or other evidence he may choose to produce along with such claim; and such town clerk, immediately on receiving such claim, shall mark upon it the date when it was delivered to him, by filling up, as nearly as may be, the form of the second part of the said schedule A, and within four days after the last day for receiving such claims, and after consulting with the provost or chief magistrate of such burgh, shall give or cause to be given intimation of all such claims, by affixing on the church doors of the several parishes within the royalty of such burgh, fourteen days at least before the time when such claims are intended to be taken into consideration, a written or printed list of all such claimants, together with a notice specifying the place where, and the day and the hour at which, such claims are to be considered; and the said notice shall also bear that any objection to such claims will be at the same time taken into consideration, provided such objections shall be lodged with the town clerk, and intimated to the party objected to, by either delivering a copy of the objection to him personally, or leaving the same at his dwelling-house, or transmitting it to him by post, seven days previous to the day appointed for considering the same, and deciding upon such claims (all such objections being signed by the party objecting or his agent, and being drawn up, as nearly as may be, in the form of the

schedule B;) and the persons claiming, and the persons objecting to such claim, shall have access to see such claims and objections in the town clerk's office at all reasonable hours, without payment of any fee for such inspection, and to obtain extracts therefrom, paying for any copy or extract of the same at the rate of sixpence for every seventy-two words: provided always, that every such chief magistrate shall be obliged, within four days after the said twenty-first day of July, to fix on and communicate to the town clerk a day for taking such claims and objections into consideration, which day shall not be less than twenty or more than twenty-five days after the said twentieth day of September in the present and the said twenty-first day of July in all future years.

III. The provost or chief magistrate, or in case of his absence or disability, the senior magistrate capable of attending in each such burgh, shall, if required by any three or more persons claiming or objecting as aforesaid, previous to the day appointed for the consideration of such claims and objections, make choice of and appoint a person of the profession of the law to be an assessor or assistant to him in the decision thereof, such assessor being always an advocate, or a writer to the signet, or a solicitor of supreme courts, or a procurator in the inferior courts, of not less than three years' standing respectively; and such provost or chief or senior magistrate and assessor shall, at the hour appointed, proceed to consider the claims and objections lodged, and shall hear the parties or their agents thereupon, and receive all competent evidence which either party may produce in support of his claim or objection respectively; but no written pleadings shall be admitted, nor any record kept of the proceedings, except that the magistrate or assessor shall make a note of the witnesses who may be examined, and authenticate by his signature any document or written evidence which may be produced; and no other witnesses shall be examined, and no other documents produced, in any court of review, than those so noted and authenticated; and, where satisfied that the claim is good, the said magistrate shall write thereon the word "admit," and sign his name thereto, and, where satisfied that the claim is bad, he shall write thereon the word "reject," and sign his name thereto; and, where the claim shall be sustained, the claimant's name shall be enrolled or entered by the town clerk of such burgh in the list or roll of electors to be kept for such burgh in manner hereinafter directed.

IV. The respective town clerks of each royal burgh shall, on or before the twentieth day of October in the present and on or before the sixteenth day of September in all future years, make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh in manner following; *videlicet*, the town clerk of each burgh which, in virtue of the said recited act, sends either severally, or in combination with any other burgh or burghs, a member or members to parliament, shall make up and complete such list by transferring from the parliamentary register for such burgh to such list or roll the names of all the voters contained in such register entitled to vote in the election of a member of parliament as are so registered in respect of properties situated within the royalty, whether original or extended, of such burgh, without requiring any claim, or admitting any objection against the persons so registered; and the respective town clerks of such of the royal burghs as do not now send or contribute to send a member to parliament, shall, in like manner, make up a complete list or roll of all the persons, qualified in manner aforesaid, who shall have been admitted as electors by the chief or senior magistrates of such burghs respectively in manner hereinbefore directed.

V. Each town clerk shall, in every succeeding year, keep his list or roll of electors in the town clerk's office, or other place appointed for keeping the records of such burgh, accessible, without fees, at all reasonable hours, from the first to the tenth day of August; and within five days after the last of these days any person intending to object to the continuance of any name on the said list or roll in any burgh not contained in the said recited act, shall be bound to give in his objections to such town clerk, in the same way and manner, and to be disposed of by such town clerk and provost or chief or senior magistrate and assessor in all respects, as objections against original claims are hereinbefore and after directed to be disposed of; and each town clerk in such burghs shall, on or before the tenth day of September in each such year, proceed to correct and complete such list or roll of electors by removing therefrom all the names to which such objections shall have been sustained, and also the names of any persons who may be known to have died since such list or roll was last com-

pleted, and shall also insert in such list or roll the names of any persons who shall respectively have been admitted as electors by the provost or chief or senior magistrate of such burghs respectively, in manner hereinbefore directed; and each town clerk in the burghs contained in the said recited act shall, in like manner, correct and complete his list of electors, on or before the sixteenth day of September, by removing therefrom the names of such as may have died, and adding the names of those who may have been inserted in the register appointed by the said recited act since it was made up in the previous year, in respect of premises situate within the royalty of any such burgh; and all persons interested shall be entitled to extracts from the said lists, paying the town clerk for every extract at the rate of sixpence for every seventy-two words contained therein.

VII. If either party shall be dissatisfied with the decision of the provost or chief magistrate and assessor, admitting or rejecting any claimant for the right of electing councillors, in any burgh not contained in the said recited act, it shall be competent to such party, within two days of the date of the decision, but not thereafter, to appeal to the court of review appointed by the said recited act for deciding upon appeals as to the registration of voters for members of parliament for the district within which such burgh may be situate, the appellant always giving notice, within the time above specified, to the town clerk of such burgh and to the opposite party, of such appeal, the notice to the said party being either delivered personally, left at his dwelling place, or transmitted through the post office, and producing to the court of appeal evidence of such notice before such appeal shall be heard; and to shall be competent for such court of appeal, if it shall affirm the judgment appealed from, to find expenses due by the appellant, and to decern for the same; and upon production of the judgment of such court, or an extract thereof, to the town clerk, keeper of the list or roll of electors of such burgh, such town clerk shall forthwith, where necessary, alter and correct such list or roll in accordance with the judgment of such court; and the sheriffs acting in such courts of appeal shall always proceed to the consideration of appeals under this act immediately after they have disposed of all the appeals under the said recited act, and shall be entitled to add the periods of time during which they may be exclusively occupied with the said appeals under this act to the periods occupied with the said other appeals, and to make the same charges for the time so occupied in their accounts in exchequer as is by the said recited act provided as to the said other appeals.

VIII. The several burghs contained in the schedule marked C to this act annexed shall be divided into wards or districts, which, together with the number of councillors to be chosen by each such ward or district shall be fixed and ascertained by the commissioners named and appointed by his majesty to inquire into and report upon the condition of the several burghs and towns of Scotland by virtue of a commission dated on the fifteenth day of July in the present year; and such commissioners shall have regard to its being the purport and meaning of this act that the number of wards shall be such that each ward shall, at the first election to be made under this act, choose, as nearly as may be, the number of six councillors, and at the subsequent annual elections in each succeeding year the number of two councillors; and the said commissioners shall, upon such division being made and completed, report the same to his majesty's privy council, who shall cause such report to be published by royal proclamation in the gazette; and the number and limits of such districts, and the number of councillors to be elected by each such district, being so fixed, reported, and published, shall be held and taken to be a part of this act, in the same manner and to the same effect as if the same were particularly set forth and enacted herein.

VIII. With and under the exceptions hereinafter provided, upon the first Tuesday of November next the electors qualified and entered in the list or roll made up as aforesaid shall, in each of the said royal burghs not contained in schedule F, choose from among such of their own number as either reside within the boundaries assigned to such burgh by the said recited act, or as may carry on business or reside within the royalty thereof, such a number of councillors as by the set or usage of each burgh respectively at present constitutes the common council of such burgh, or where such number admits of variation, then the smallest number which may by the existing set and usage constitute a full council in any such burgh, in manner following; that is to say, in all such burghs as are contained in the said schedule C, and divided into wards or districts as aforesaid, the qualified electors of

each district whose names shall be in the said list or roll of such electors shall, at some place or places to be appointed for each such ward or district, of which intimation shall be made by notice affixed on the church doors of the several parishes of such burgh ten days at least previous to such election, proceed to elect, from and among the persons contained in the list or roll of the whole electors for such burgh, as many councillors for such burgh, being either resident or personally carrying on business as hereinbefore provided, as shall, by the report of the commissioners aforesaid, and the proclamation thereof aforesaid, have been fixed and ascertained as the number of councillors to be elected in each such ward, by open poll, to be taken in the presence of the provost or chief or senior magistrate of such burgh, or of a legal substitute or substitutes to be appointed by him to officiate and preside at the polling place or polling places in each such ward or district, from among the persons of the law described and qualified as aforesaid in relation to the assessor to be appointed by any chief magistrate, to judge of the claims of enrolment to be made as aforesaid; and the town clerks of such burghs, or the persons who may be appointed by the provost or chief magistrate thereof to officiate as poll clerks in the several wards thereof, which persons such provost or chief magistrate is hereby authorized to appoint, shall each have with him a certified copy of that part of the foresaid list or roll which contains the names of the voters qualified in respect of property situate in each such district, according to which the votes shall be taken; and it shall not be competent at such poll to inquire into any other facts but the identity of the party tendering a vote and the person mentioned in the list or roll, his still holding the qualification there mentioned, and his not having previously voted at the same election; all which facts it shall only be competent to prove by the oath of the party so tendering his vote, if required by any other voter on the list or roll; and no other oath shall be put at such election except only an oath against bribery, which, if required by any voter on the roll, shall also be put by the magistrate or substitute at each polling place; which two oaths shall be put in the form of schedules D and E; and each poll clerk shall enter each vote for each person proposed in a poll book, and the provost or chief magistrate or substitute presiding at such election, and the clerk or person taking the poll, shall subscribe their names to each page of such book before any entry shall be made in the succeeding page.

IX. No poll by this act authorized shall be kept open for more than one day, and that only between the hours of eight in the morning and four in the afternoon, it being competent to the town clerk to appoint as many polling places in each ward, and as many booths or divisions at each polling place, as may be necessary for completing the said elections within the said period.

X. At all such elections of councillors for the burghs contained in the said schedule C the poll books for the several wards or districts of the said burghs shall, at the close of the poll, be sealed up by the persons who shall have presided at the elections of the several wards and taken the polls thereat, and shall be transmitted to the provost or chief or senior magistrate, who, on the next lawful day after the receipt of the same, between the hours of twelve and two, and within the town house or other public building of such burgh, shall openly break the seals, and with the assistance of the town clerk, and such other persons as he may think fit to employ, shall cast up the votes given, and shall declare upon whom the election has fallen by the majority of votes (making a double return in any case where the votes shall be equal), and shall forthwith give, or cause to be given, notice in writing to the several persons elected of such their election, and require them severally to appear in the town hall, or other public room aforesaid, on the second lawful day after such election, when they shall severally declare whether they accept or decline accepting the office of councillor; and if any such person shall be found to have been elected by more than one of the said wards or districts, he shall thereupon declare for which ward he intends to serve; and wherever this shall occur, or where there shall be a double return for any ward, or where any person elected shall decline accepting, then and in all such cases the presiding magistrate shall immediately appoint a new election of a councillor or councillors in place of him or them so chosen elsewhere and so declining, at the distance of not more than four nor less than two days, and affix notices of the day so appointed on the church doors of the burgh; and such election shall be proceeded in, in all respects in the same manner in which the first election in the said wards or districts, and the taking the poll, casting up the votes, and declaring the

result, is hereinbefore directed to proceed, until the council of such burgh shall be completed.

XI. Upon the said first Tuesday of November next, the qualified electors of all the said royal burghs, not contained in the said schedules C or F, shall assemble in the town hall or other public room of such burgh, and choose from among their own number such and the like number of councillors, being resident or personally carrying on business, as hereinbefore provided, as by the set or usage of such burghs respectively at present constitutes the common council of such burgh, or, where this is variable, the smallest number constituting a full council, and shall declare their votes by a list containing the names of the persons for whom each elector respectively intends to vote, which several lists shall be signed by each such elector respectively, and shall be openly given in by each elector to the town clerk of such burgh on the day of election; and such town clerk, together with the provost or chief or senior attending magistrate of the burgh, who shall preside at such election, no other inquiry being permitted, or other oath allowed to be tendered than as hereinafter provided as to the burghs in schedule C, shall publicly cast up the number of votes, and shall declare upon whom the election has fallen by the majority of votes; and the provost or chief or senior magistrate shall forthwith give or cause to be given notice in writing to the several councillors elected of such their election, and call upon them severally to appear in the town hall or other public room aforesaid on the second lawful day after such election, when they shall severally declare whether they accept or decline accepting the office of councillor; and if any such person so elected shall decline to accept, or in case there shall be an equality of votes in favour of two or more persons the whole of whom cannot be received as councillors, a new election shall immediately thereafter take place for the vacant place or places of the councillor or councillors so declining to accept, or elected by equal numbers, to be intimated as hereinbefore provided as to the burghs in schedule C, and to proceed in the same manner in all respects in which the election for councillors is hereinbefore directed to proceed, until the council of such burgh shall be completed.

XII. Nothing in this act contained shall be held to affect or apply to the several burghs contained in schedule F to this act annexed; but the election of councillors and magistrates in all the burghs contained in the said schedule F shall proceed and be conducted in the way and manner hitherto practised in such burghs, and as if this act had not been passed.

XIII. In all the cases of election hereinbefore directed, if any person elected as councillor shall fail to attend on the day appointed for declaring his acceptance, he shall be held to have declined accepting the said office, unless he then transmit to the meeting a sufficient written explanation, signed by himself or his agent, of the cause of his absence, and intimating his acceptance.

XIV. No person shall be entitled to be received and inducted as councillor who shall not, previous to such induction, be entered a burgess of the burgh for which he is so elected, wherever there is any body of burgesses in any such burgh; and each such person so elected shall produce, when he declares his acceptance, the evidence of his being such burgess; and his omission so to do shall be held to vacate his election in the same manner as if he had declined to accept: provided always, that no merely honorary burgess shall be entitled to be so inducted, and that any person so elected shall be forthwith entitled to be entered as a burgess on payment of the ordinary fees.

XV. Upon the first Tuesday of November one thousand eight hundred and thirty-four, and in every succeeding year, the electors in such burghs shall in like manner, *videlicet*, the burghs contained in the said schedule C in their several wards or districts, and the other burghs at their general meetings, assemble and elect, in manner hereinbefore prescribed in relation to the first election under this act, one third part, or as nearly as may be one third part, of the council of such burghs, in the place of the third thereof who shall, as hereinafter directed, go annually out of office, the wards or districts into which the burghs contained in the said schedule C are divided then electing such number of councillors as by the said royal commission such wards or districts shall be directed to elect at such annual elections subsequent to the first election.

XVI. Upon the said first Tuesday of November in the year one thousand eight hundred and thirty-four, and in every succeeding year, one third, or a number as near as may

be to one third, of the whole council of each such burgh, shall go out of office; and in the said year one thousand eight hundred and thirty-four the third who shall go out shall consist of the councillors who had the smallest number of votes at the election of councillors in this present year; and in the succeeding year, one thousand eight hundred and thirty-five, the third of the councillors first elected under this act who shall go out shall consist of the councillors who at such first election under this act had the next smallest number of votes. (the majority of the council always determining, where the votes for any such persons shall have been equal, who shall be the persons to retire,) and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office: provided always, that any councillors so going out of office shall be capable of being immediately re-elected.

XVII. The councillors of all such burghs not contained in schedule F to this act annexed respectively so elected and accepting shall, upon the third lawful day after the election of the whole number of such councillors in the present year, assemble in the town hall or other usual public place of meeting within such burgh, and shall there by a plurality of voices (the councillor who had the greatest number of votes at the election of councillors having a casting or double vote in case of equality), elect from among their own number a provost or chief magistrate, the number of bailies fixed by the set or usage of such burgh, a treasurer, and other usual and ordinary office bearers now existing in the council by the set or usage of each such burgh, and shall also elect the managers of any charitable or other public institution existing in or connected with such burgh, the appointment of the managers to which is at present vested in the magistrates and town council of such burgh.

XVIII. With and under the exception hereinafter enacted, upon the completion of the first election of councillors, magistrates, and office bearers to be made in all the royal burghs in Scotland under the provisions of this act, and not sooner, the provost, magistrates, office bearers, and other councillors now in office in such burghs respectively shall go out, and their whole powers, duties, and functions shall cease and determine, except only where any of the said persons shall have been again elected under the provisions of this act.

XIX. Except as hereinafter excepted, the offices and titles of deacon, and of convener and dean of guild, and of old provost and old baillie, as official and constituent members of any town council, shall, after the completion of the first elections under the provisions of this act, cease and determine, and no distinction shall afterwards be kept up or recognized between trades bailies and merchant bailies, or trades councillors and merchant councillors, in any such council: provided always, that (except as hereinafter excepted) the duties and functions heretofore performed by the dean of guild in such council, or in any dean of guild court of such burgh, shall, in all the burghs where there now is such an officer, be performed by a member of the council to be elected, in manner hereinbefore provided, by the majority of councillors.

XX. Where any trust, management, or direction is by the terms of any public or local act, or of any charter or deed of foundation, or other deed, conferred on any members of the council under the denomination of old provost, old baillie, or old dean of guild, or of merchant or trades bailies or merchant or trades councillors, respectively, the town councils to be named and elected in terms of this act shall, immediately after their own acceptance and induction into office, nominate and elect from their own body such a number of persons to be such trustees, managers, or directors as are by such acts, charters, or deeds appointed to those offices under the said denominations; and the whole powers and functions now belonging to the said offices of trustees, managers, or directors shall belong to and be as fully vested in the persons so elected as if they had possessed the denominations used in the said acts, charters, or deeds.

XXI. Nothing herein contained shall be held or construed to impair the right of any craft, trade, conveyery of trades, or guildry, or merchants house or trades house, or other such corporation, severally to elect their own deacons or deacon convener, or dean of guild or directors, or other lawful officers, for the management of the affairs of such crafts, trades, conveyeries of trades, or guildries, merchants or trades houses, or other such corporations; but that, on the contrary, the said several bodies shall, from and after the passing of this act, be in all cases entitled to the free election in such form as shall be regulated by them of the

said several office bearers, and other necessary officers for the management of their affairs, without any interference or control whatsoever on the part of the town council or any member thereof.

XXII. From and after the time when this act comes into operation the persons elected (or to be elected) as hereinbefore provided to the offices of dean of guild and deacon convener, or convener of trades, by the convenery and guild brethren respectively in the city of Edinburgh, and to the offices of dean of guild and deacon convener by the merchants house and trades house respectively in the city of Glasgow, shall, in virtue of their said elections by the said guild brethren, convenery, merchants house, and trades house respectively, be constituent members of the town councils of the said cities, and shall enjoy all the powers, and perform all the functions now enjoyed or performed by such office bearers in these cities; and in like manner the persons elected (or to be elected) to the offices of deans of guild by the several guildries of the city of Aberdeen and the towns of Dundee and Perth shall, in virtue of such their elections, be constituent members of the town councils of the said city and burghs respectively, and shall as such enjoy all the powers and perform all the functions now exercised or enjoyed by the existing deans of guild in the said city and burghs respectively; and the registered electors, qualified as hereinbefore provided, in the said cities and burghs of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth shall, in November in the present year and in all future years, elect only such a number of councillors as, with the addition of the said deans of guild and conveners to be so elected as aforesaid, make up the number of councillors now existing in the said several cities and burghs; and the councillors so elected in the said cities and burghs of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth shall not, at the subsequent election of magistrates and office bearers, elect any other persons to fill the offices or perform the functions of deans of guild or conveners, but these offices shall be held and exercised, in the said councils and otherwise, by the persons so elected as aforesaid in the said cities and burghs of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth respectively, and by no other persons.

XXIII. Where any trust, management, or direction of any charitable or other institutions is vested in any number of deacons, or in a deacon convener, or convener of trades, or in any dean of guild, or other office bearers elected or hereafter to be elected by the several crafts, trades, guildries, or merchants, or trades houses, then and in all such cases the persons so elected as such deacons, conveners, deans of guild, or other officers shall always be and continue trustees and managers of such charities or institutions, whether such persons shall hereafter be members of council or not; and the town councils shall in no such case have power to elect from their own body any other trustees or managers in place of such deacons, conveners, deans of guild, or other officers: provided always, that in any burgh in which trades councillors or merchant councillors are or may be *ex officio* trustees or directors of any such institutions or charities, the convenery or trades house and the guildry or merchants house in such burghs shall elect an equal number from their own bodies respectively to be such trustees or directors, anything herein contained to the contrary notwithstanding.

XXIV. When any magistrate or office bearer (other than the provost or chief magistrate and treasurer) shall be in the third of the council going out of office, the place of such magistrate or office bearer shall be supplied by election by the council as soon as the full number thereof shall have been completed by the annual election of the third then hereby directed to take place, the said election to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting voice in case of equality: provided always, that the provost or chief magistrate and the treasurer shall always remain in office for the period of three years, and that they, as well as all the other magistrates or office bearers, shall at all times be capable of being re-elected.

XXV. If any vacancy shall in the course of the year occur in the council or magistracy or office bearers of any such burgh by death, disability, or resignation, the same shall be filled up *ad interim* by the remaining members of the council, by election, as hereinbefore provided, at a meeting to be called on five days' notice by the town clerk, by intimation in writing to each of such remaining members of the council; but any councillor, magistrate, or office bearer so elected *ad interim* shall go out of office on the first Tuesday of November



next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of councillors and magistrates or office bearers in such burgh; provided that if the vacancy shall have occurred in any burgh contained in the said schedule C, such vacancy shall at such annual election be supplied by the ward of such burgh by which the councillor who had died or resigned, or been disabled, had been elected, and which shall in this case elect an additional councillor, unless the party so dying or disabled would then have gone out of office as one of the third hereby directed to retire.

XXVI. Any person elected and accepting the office of councillor, magistrate, or other office bearer in any town council, under the provisions of this act, may resign his said office at any time, upon giving not less than three weeks' notice of such his intention by a written intimation to the town clerk or chief or senior magistrate; and in the event of such resignation being intimated as to be made at the period of the annual retirement of one-third of the council, such additional number of councillors shall then be elected as may be necessary to complete the council: provided always, that no fine or other penalty shall be exigible from any person either declining to accept after his election or subsequently resigning his office.

XXVII. Where any royal burgh shall, in consequence of the decision of a court of law or otherwise, be without any legal council or magistracy at the time when this act comes into operation, or at any future time, all the functions directed by this act to be performed by the existing magistrates or councils shall be performed by one or more of the managers, who may, by any lawful appointment, be then in the actual administration of the affairs of any such burgh.

XXVIII. No councillor, nor the partner in business of any councillor, shall be capable of holding the office of town clerk in any such burgh; and no town clerk shall, during the period he shall hold that office, interfere directly or indirectly in the election of the magistrates or town council of any such burgh.

XXIX. All the notices or intimations hereby directed or required to be given or made in any such burgh of any meetings or proceedings to be held or had in the matter of the elections of or respecting such burgh, shall, where not directed to be otherwise given, be given or made by the respective town clerks thereof.

XXX. The several persons officiating at elections as substitutes for the provosts or chief magistrates in the several wards or districts into which the burghs contained in the said schedule C shall be divided (not being the town clerks of such burghs), shall be entitled to receive a sum not exceeding three pounds three shillings for each day they shall respectively be so employed, the poll clerks officiating at such elections being each entitled to the sum of one pound one shilling for each day, and the several persons who shall be appointed to assist the provost or chief magistrate of any of the royal burghs as assessors in disposing of claims and objections as aforesaid (not being the town clerks of such burghs) shall be paid a like sum, not exceeding three pounds three shillings, each day such persons shall be so employed; which sum, together with all the other expenses attending such elections, or the making up of the lists or rolls of electors, giving notices at the church doors, and providing copies of the said rolls, or parts thereof, for the purposes of election, shall be defrayed from the common good or other means or revenues of such burghs respectively.

XXXI. The magistrates and council and office bearers to be elected under the provisions of this act, shall, in all respects, stand in relation to the administration of the affairs and property of such burghs, or of property under the care and management of such burghs, in the same situation in which the magistrates and council and office bearers of such burghs did stand previous to the passing of this act; and the magistrates and council and office bearers to be elected under the provisions of this act, shall have such and the like jurisdiction, and the same rights and powers of administration of the property and affairs of the burgh, and of making all usual and necessary appointments, as heretofore lawfully belonged to and was exercised by their predecessors in office; any thing in the act, usage, or custom of any such burgh to the contrary notwithstanding.

XXXII. The existing magistrates and council in all royal burghs shall, on or before the fifteenth day of October in the present and in all future years, make up a distinct state of their affairs, subscribed by the chief or senior magistrate, town clerk, and treasurer,

containing an account of all the funds, properties, and revenues in their administration, and of all their transactions in relation to such funds, properties, and revenues since they came into office; which amount shall be brought down as nearly as may be to the said fifteenth day of October, and shall be kept in the town clerk's or treasurer's office, for the inspection of any of the registered electors, from the said fifteenth day of October down till the time of the election; and a full and distinct abstract of the said account, with a balance sheet, containing all necessary particulars, shall be printed and published by the said magistrates on or before the twentieth day of the said month of October.

XXXIII. No councillor or magistrate elected and accepting under the provisions of this act, shall incur by such election or acceptance any other responsibility for the debts of the burgh, or the acts of his predecessors in office, than might have attached to him as a burgess or inhabitant, independently of such election.

XXXIV. If any magistrate, councillor, town clerk, sheriff, or other person shall wilfully contravene or disobey the provisions of this act, he shall be liable to be sued for such offence in the court of session by any person aggrieved for the penal sum of three hundred pounds; which sum, or any smaller sum which may be assessed by the jury in any such action, the defender, upon conviction, shall pay to the pursuer with full costs of suit: provided always, that every such action shall be raised within four calendar months after the cause of action shall have arisen, and that notice in writing shall be given to the defender at least one calendar month before raising the same: provided also, that any such defender against whom judgment shall have been once recovered in such action shall be entitled to plead such judgment as a bar to any other action which may be brought against him for the same matter or thing; and such other action being thereupon dismissed, such defender shall recover his full costs of suit.

XXXV. No misnomer or inaccurate description of any person or place in any writing made in the form of any schedule to this act annexed, or in any list or register or notice, or other writing, made under authority of this act, shall in any way prevent or abridge the operation of this act; provided that such person or place shall be so designated in such writing, list, register, or notice as to be commonly understood.

XXXVI. All laws, statutes, and usages now in force respecting the royal burghs in that part of Great Britain called Scotland, shall be and the same are hereby repealed in so far as they are inconsistent or at variance with the provisions of this act, but in all other respects the same shall remain in full force and effect: provided always, that the oath termed the burgher oath shall in no case hereafter be required to be taken in any burgh.

XXXVII. No irregularity or nullity in the election of any councillor or magistrate shall in any case, after the passing of this act, annul or affect the election of other councillors or magistrates not liable to the same grounds of objection, but those particular elections only in which such irregularity or nullity shall have occurred.

XXXVIII. This act may be repealed, altered, or amended by any act or acts to be passed in the present session of parliament.

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#### SCHEDULES TO WHICH THE FOREGOING ACT REFERS.

##### SCHEDULE A. (Part I.)

City [or burgh] of

I A. B. [insert designation] hereby claim to be enrolled as a voter for the town councillors of the said city [or burgh] in respect of my interest in the house, shop, *et cetera*, situated in [here insert the situation of the premises, described by the street, number, parish, or other locality]; and [in cases where the claimant chooses to make such production] in support of my claim I produce herewith a [disposition, *seisin*, lease, *et cetera*, dated, *et cetera*, as the case may be.]

[Date.]

(Signed) A. B.

## SCHEDULE A. (Part 2.)

Number lodged with me C. D., town clerk of this day  
together with the disposition, *reisin, lease, et cetera*, above  
written [in cases where any such documents are lodged.]

(Signed) C. D.

## SCHEDULE B.

City [or burgh] of

I A. B. [or we C. D., E. F., *et cetera*,] object to the claim of A. B. to be admitted [or to continue on the roll] as a voter for councillors in the city [or burgh] of on the following ground [here may be stated shortly the grounds, as that property or occupancy not of sufficient value, that the party is not or has ceased to be proprietor, tenant, or occupant, or is personally disqualified, as being a minor, a fatuous person, *et cetera*]; and I crave to be heard on the said objection or objections before the chief magistrate or assessor.

[Date.]

(Signed) A. B.

## SCHEDULE C.

Edinburgh.  
Glasgow.  
Aberdeen.  
Dundee.

Perth.  
Dunfermline.  
Dumfries.  
Inverness.

## SCHEDULE D.

I A. B. do solemnly swear [or affirm], that I am the individual described in the list or roll for the city [or burgh] of as A. B. of

[here insert description in the same words as contained in the roll]; that I am still the proprietor [or occupant] of the property for which I am so enrolled, and hold the same for my own benefit, and not in trust for, or at the pleasure of, any other person; and that I have not already voted at this election.

## SCHEDULE E.

I A. B. do solemnly swear [or affirm], that I have not received or had, by myself or any person for my use or benefit, any sum or sums of money, office, place, or employment, gift, or reward, or any promise or security for any money, office, or gift, in order to give my vote at this election.

## SCHEDULE F.

Dornoch.  
New Galloway.  
Culross.  
Lochmaben.  
Bervie.

Wester Anstruther.  
Kilrenny.  
Kinghorn.  
Kintore.

DEAN OF GUILD COURT.—*Gild* is an old Saxon word signifying fraternity. The dean of guild was instituted after the example of certain cities in France and Flanders, where bourses were constituted. *Bourse* signifies an exchange, or “that place where merchants most do congregate,” for negotiating and transacting business. According to an old law, power was conferred on the dean of guild to judge in mercantile and maritime cases within the burgh; but it is long since he has exercised that branch of jurisdiction. His proper duty now is to take care that buildings within the burgh are sufficient; that they are erected agreeably to law, and neither encroach on private or public property. He may

order insufficient buildings to be taken down. Though a magistrate of a royal burgh, his jurisdiction is unconnected with the baillie court. His judgments are liable to review in the court of session.

**JUSTICE OF PEACE COURT.**—Justices of the peace are persons appointed by royal commission to keep good order and tranquillity within a certain district. In England they were appointed by the crown as early as the second year of Edward III., but in Scotland they were not appointed before the year 1609. An attempt was made in 1587, to introduce the office into Scotland; but the state of manners at that time was not such as to promise success to a regulation of this nature, and it required repeated legislative acts to lay the foundation of this valuable system: nor does this appear to have been fully accomplished until the usurpation of Oliver Cromwell: after which Charles II. consented to an act\* which prescribed these rules which in a great measure have ever since regulated this important branch of public police. It empowered them to proceed against all persons committing riots and breaches of the peace under the degree of noblemen, prelates, counsellors, and senators of the college of justice; and if any of the offenders being charged to appear before the said justices shall disobey, the summons being indorsed, the lawful citation verified, and the fact proven, the justices are to punish and fine the party not appearing, according to the quality of the crime and the estate of the offender. And for the clearer determination of the order to be observed by justices in the deduction of any such processes, it is by the last mentioned statute enacted, "that it shall be lawful to the said justices, whensoever they have any occasion to move any action against parties for committing any like fact or riot, to refer the first summons to the parties' oaths of verity, failing of other lawful probation, who being personally summoned by that first citation, shall be holden as confessed, and decreet to be pronounced against him, conform to the libel and summons; and if he be not personally summoned by the first citation, the said justices shall be holden to cause summon him of new again by a second summons at his dwelling house, which two citations shall be as sufficient to infer decreet and sentence upon the libel against him, as if he were apprehended personally: and which sentence given after the manner and form of probation above written, his majesty with the advice and consent of his estates of parliament, authorizes and sustains as good and lawful in themselves." They are also to give order for repairing highways, to punish those who straiten them, and to execute the laws against beggars, vagrants, swearers, and other disorderly persons. The same act also authorized them to judge in the ordinary hire and wages of labourers, workmen, and servants; and

\* 1661, c. 38.

in case they refuse to serve upon the price set down by them, the justices are empowered to imprison and punish them at their discretion; and to compel their masters or employers to pay their wages. By the articles of Union the laws for regulating the trade, customs, and excise, are declared to be the same in Scotland as in England. And accordingly, in Scotland, justices of the peace are vested with the same powers as those in England in customs and excise affairs.\* And the same powers were given to justices of the peace in Scotland, which had formerly been enjoyed by justices of the peace in England, in relation to, and for the preservation of the peace, leaving the trials and judgment by the forms and customs of the Scottish courts of law. This act removed certain restrictions in regard of the persons subject to the jurisdiction of justices of the peace, and in regard to the time within which they were at liberty to act; and placed them on the same footing in these respects with justices of the peace in England.

No particular qualification in rank or property, is required in Scotland, to act as a justice of the peace: whoever is named in the commission may accept and act. Before acting, however, it is necessary to take the oath *de fidei administratione*, in the above terms. The oath of allegiance, of assurance, of abjuration, and of supremacy, must also be taken by the justices before they enter upon their office.

The general jurisdiction of justices of the peace relates only to the preservation of the peace. They are expressly intrusted with the execution of several penal statutes concerning rural economy, such as those relating to planting, enclosing, and the like; and various ministerial duties connected with the regulation of the highways are likewise committed to them. They also judge in many important questions connected with the revenue of customs and excise, and other branches of the revenue; and by special enactments in several statutes, certain ministerial or judicial powers are conferred on justices: but it may be generally stated, that no justice can act with safety in virtue of statutory powers, without having the particular act conferring these powers before him.

The civil jurisdiction of justices of the peace in Scotland has been greatly enlarged by the small debt acts. Justices of the peace judge in questions of aliment to natural children, as being in some degree connected with the public peace; and also by usage, resting partly on statute, they judge in questions concerning servants' wages. With these exceptions, however, they seem to have no civil jurisdiction, except under special statutes. They have a statutory jurisdiction with regard to the expense of march fences and the straightening of marches, and also (although that is not so clear) with regard to the damage done by cattle who have tres-

\* 6 Anne, c. 6.

passed, and have been poinded, *brevi manu*, on the grounds of another person. It is still more doubtful whether justices can judge competently in an action embracing a civil claim for damages, for injury done by the offender, as well as a conclusion for fine or imprisonment in a libel at the instance of the public prosecutor, and the private party for an assault. Under the small debt acts, a person who has been injured by an assault or otherwise, may sue before the justices for reparation or damages from the person who has injured him, as a mere civil debt, provided he limits his claim to the value of £5. But there is an obvious and broad distinction between such a claim of debt under those statutes, and an action concluding for fine or imprisonment against the offender, on account of his offence against the public peace, and at the same time for civil reparation to the injured party. In such mixed actions their jurisdiction may be warranted in some instances by custom, but it seems hardly reconcilable with sound legal principles.

Although, generally speaking, justices cannot act in cases in which they are personally interested, they may act in all questions concerning the poor, vagrants, highways, or other laws respecting parochial rates, though liable themselves in the burdens imposed for these objects. A justice of the peace may also commit a person who assaults him or violently interrupts him in the execution of his office, until the offender find security to keep the peace. But justices cannot act in the determination of any appeal to the quarter sessions from any thing relating to the parish or place in which they are subject to those rates.\* By special enactments, commissioners of excise and customs, and others connected with those branches of the revenue, cannot act as justices of the peace; and similar exceptions apply to officers of the army, and to coal masters, in questions relating to soldiers and colliers.

Unless authorized by special statute, justices cannot exercise any judicial or coercive power as justices, beyond their own county. But they may perform ministerial acts, such as receiving the statements of a person who has been robbed or assaulted; and they may also exercise voluntary jurisdiction beyond their territory, such as taking affidavits in general, taking the judicial ratification of married women, and the like. Justices are liable to criminal prosecution before the court of justiciary; and in like manner to civil actions of damages before the civil court, on account of oppression or injustice, or other illegal proceedings in their official capacity. But in such cases they are leniently dealt with, and large allowances are made for errors and defects in judgment and capacity, where it appears that they were acting *bona fide* for the public good.

\* 16 Geo. II., c. 18.

And by special statute it is provided, that in actions against any justice of the peace in Great Britain or Ireland, (which statute includes Scotland), for any summary conviction under any act of parliament, or for any thing done by him towards carrying such conviction into effect, if the conviction shall be quashed, the plaintiff (besides any penalty levied) shall recover only twopence without costs, unless malice and want of probable cause be expressly alleged; and that the damages, penalty, or costs, shall not be recovered, if the plaintiff be found guilty of the offence, and the punishment undergone did not exceed that assigned by law.\* Justices of the peace, however, ought to act with exceeding caution in every thing relating to the personal liberty of the subject; for, in such cases, the plea of good intention will not justify an illegal act. This is particularly the case under the liberation statute of 1701, whereby justices and other judges are subjected to penalties for error, whatever their intentions may have been.

A justice of the peace receives no pecuniary recompense; but he will be reimbursed by the sheriff of the county for any pecuniary advances properly made for the public in the execution of his office: such disbursements being either presented in exchequer, or repaid from the county rogue money. A commission of the peace may be recalled at any time by the king, and it falls by the demise of the crown; by statute,† however, it is continued for six months longer, unless the successor should recall it. The clerk of the justices, or of the quarter sessions, is named by the secretary of state. The books in which their proceedings are recorded are kept by the clerk.

The fiscal is an officer who gives his instance or concurrence to the steps necessary to be taken for the apprehension and prosecution of delinquents: and this officer is also appointed collector of the fines and penalties which the justices of the peace have the power to impose. The procurators of the sheriff's court practise before the justices, (except under the small debt act), and the warrants of the justices are executed by constables, who are officers appointed by the justices of the peace.

In the Scottish commission there is not a *custos rotulorum* as in England; and the *quorum*, or a certain number of justices with superior powers, on account of their superior knowledge, formerly named by the English commissions, has never been introduced into the Scottish ones.

Although justices of the peace are not invested by their constitution with any civil jurisdiction, yet in the county of Edinburgh and some other places they had been, past all memory, in the practice of determining small claims not exceeding £40 Scots, or £3 : 6 : 8d. Sterling. If not directly

\* 43 Geo. III., c. 131.

† 1 Anne, c. 8.

sanctioned, this was not discountenanced by the supreme court, there appearing a strong necessity that some remedy should be applied to relieve the expense of litigation in the courts of common law. The proceedings, to avoid expense and delay, were quite summary. There was no libel, but merely a charge, by a messenger, for the defender to appear the following day. As the necessity and advantage of this court became more apparent, subsequent enactments conferred on it more power and jurisdiction. The *small debt act*\* conferred a summary civil jurisdiction on the justices of the peace, in small causes, where the debt does not exceed £5, exclusive of expenses. The cause may be heard before any two or more justices of the peace, within their respective counties, and decided agreeably to equity and a good conscience. The decrees of the justices under the small debt act, may be enforced by poinding or summary imprisonment. But the provisions of this act have been repealed by a recent act, and which is inserted in page 285, which took place on the 1st January 1826,† in which similar provisions are enacted, providing that the decrees of the justices shall be final, and not subject to review by advocacy or suspension, nor to reduction, except on the ground of malice and oppression on the part of the justices; which action must be brought within one year from the date of the justices' decree. By a previous statute,‡ a peculiar and summary jurisdiction in small causes, where the debt does not exceed £8 Sterling, exclusive of expenses and fees of extract, is conferred on sheriffs in Scotland. Both in the principle and details, this statute resembles that in regard to small debts recoverable before justices of the peace. No procurator is allowed, without the special leave of the sheriff to plead *viva voce* for the parties, nor without his leave are the pleadings reducible to writing. The sheriff's decrees, like those of the justices, are not subject to review nor reduction, except on the ground of malice or oppression. In ordinary cases the parties must appear before the sheriff, and be heard plead their own cause.§

**BARON COURT.**—In its more ordinary acceptation, the title of baron is the degree of nobility next to a viscount. But anciently, in Scotland, all those vassals who held their lands immediately of the crown, were termed barons. When titles of nobility were conferred on these barons, they were called the *greater barons*, but both the greater and the proprietary barons sat indiscriminately in the Scottish parliament until 1427, when by the act of that year,|| the attendance of the lesser barons was dispensed with, on condition of their sending representatives from each county, to be called *commissioners of the shire*. Subsequent acts¶ renewed their leave of

\* 39 & 40 Geo. III., c. 46.

† 6 Geo. IV., c. 48.

‡ 6 Geo. IV., c. 24.

§ Boyd's Judicial Proceedings.—Bell's Law Dictionary.—Hutchison's Justice of Peace.

|| C. 102.

¶ 1457, c. 75; 1503, c. 78.



absence, and extended the privilege to all barons whose valuation is under 100 merks new extent. Leave of absence at that time was a privilege enjoyed by the lesser barons, but it was optional to use it; and at last, from their almost total failure to attend, an opinion prevailed that they had no right to sit in parliament, unless when elected as commissioners of shires. When, however, a seat in parliament became an object of ambition, it was necessary to settle this question; and the plan of representation was introduced\* on which the election law of Scotland was founded up to the period when the reform of parliament bill† entirely changed the law.

But although every person, holding of the crown came under one or other of the above denominations of greater or lesser barons; yet to constitute a baron in the strict sense of the word, his lands must have been erected, or at least confirmed by the king, in *liberam baroniam*: and such a baron had a jurisdiction both civil and criminal, which he might have exercised either in his own person or by his bailie. But this jurisdiction was reduced‡ to the right of recovering from his vassals and tenants the feu duties and rents of the land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions where the debt or damage does not exceed 40s., and beyond this his civil jurisdiction cannot be prorogated. The baron's criminal jurisdiction extended anciently to all crimes except treason and the four pleas of the crown; but by the same statute it is now limited to assaults, batteries, and smaller offences, which may be punished by a fine not exceeding 20s., &c. When a fine is inflicted, it is to be recovered by poinding, or, in default of goods, by one month's imprisonment at farthest. But this jurisdiction is encumbered with so many regulations and restrictions, that the baron seldom or never exercises it. No future charter of the creation of a barony shall convey any higher jurisdiction, than for recovering the rents of lands, multures, and mill services.§ An exception has however been made by a late statute,|| by which the king is authorized to erect free and independent burghs of barony in those parts of the sea coast in which the fisheries are carried on: in such burghs, the magistrates are to exercise the power of justices cumulatively with the justices of the county.¶

KING'S ADVOCATE—Or lord Advocate, as he is commonly called, is nearly the same in Scotland as the attorney general in England; and his business is to pursue and defend in all causes wherein the king has an interest. His office is very honourable, and he is in virtue of it styled *my lord*. He is allowed to sit within the bar of the court of session covered, where only the peers of the realm are allowed to sit.\*\* His

\* 1587, c. 114; 1661, c. 35; 1681, c. 21.

† 1 Will. IV., c. 65.

‡ 20 Geo. II., c. 43.

§ 20 Geo. II.

|| 35 Geo. III., c. 122.

¶ Bell's Law Dict.—Boyd's Proceedings.—Wight's Origin of Parliaments, chiefly Scottish.

\*\* Beatson's Political Index, III. 118.

majesty's advocate was also anciently a lord of session : all complaints of a *criminal nature* before the court of session, must have the instance or concurrence of the lord advocate. He may decline to prosecute; but it has been found that he cannot refuse to give a private complainer his concurrence, which infers no personal responsibility.\*

"Albeit," says the learned and celebrated Sir George Mackenzie, lord advocate during the reigns of Charles II. and James II., "the king's advocate be the pursuer in most cases, yet he uses ordinarily to constitute a depute, who should produce a written warrant under his own hand, else he cannot be admitted; and this depute cannot desert a diet, though his procurancy do not instruct him with a particular power to that effect." His majesty's advocate does not usually prosecute for treason, without a special warrant under his majesty's hand, or a particular order from the privy council, which he usually produces *ante omnia*, and which is marked by the clerk. The lord advocate claims to examine parties and witnesses before the process be intended, under pretext that he may thereby know how to frame the indictment exactly, and that he may not vex parties, should he not find ground for the prosecution: "but," continues Sir George, "many learned lawyers have always thought this a dangerous procedure, for his majesty's advocate is still a party interested, and, as such, should not be allowed to deal with the witnesses, because he may thereby extract from them what otherwise they would not have deposed at that time. And as it was found that he ought not to make the roll of assizers, because he is too closely interested, much less should he, for the same reason, be

\* Beveridge's Forms of Process, I. 50.—Forbes, in his *Journal of the Session*, folio, Edinburgh, 1714, Preface, p. xxv., says, "Sir Thomas Hope of Kerse, admitted a lord of session, 19th July, 1642, and made justice-general, 27th of that month, was second son to Sir Thomas Hope of Craighall, advocate to king Charles I., before whose time the king's advocates used to plead *uncovered*. But he having two of his own sons on the bench, viz. Sir John, his eldest son, and this Sir Thomas, the lords indulged him with the privilege of pleading *with his hat on*, which his successors in office have ever since enjoyed." This statement of the origin of the privilege, which has been copied into several succeeding publications, turns out to be erroneous. Sir Thomas Hope was appointed advocate to Charles I., in 1626, jointly with the former king's advocate, Sir William Oliphant, who died 13th April, 1628, aged 77, when Sir Thomas became sole advocate. By act of sederunt of 12th July, 1626, liberty was granted to Sir Thomas Hope, king's advocate, to plead with his hat on. This act of sederunt is not extant, the book of that period being lost; but it is referred to in an act of sederunt of 2d June, 1649, granting to Sir Thomas Nicolson, king's advocate, the same privileges as were granted to umquhille Sir Thomas Hope, particularly "that he might have the liberty of pleading with his hat on, as was granted to the said umquhille Sir Thomas, conform to act of sederunt of 12th July, 1626." Sir John Hope of Craighall, eldest son of Sir Thomas, was appointed a lord of session, 21st July, 1632, six years after the grant, and Sir Thomas Hope of Kerse, second son of Sir Thomas, was nominated a lord of session by act of parliament, 13th November, 1641, nine years later, proving the statement of the origin of the privilege in Forbes' *Journal* to be incorrect. Sir Thomas Hope continued king's advocate till his death, 1st November, 1646; his second son, Sir Thomas, a lord of session and justice-general, predeceased him, having "deceasit in Edinburgh, within his awin dwelling-hous, 23d August, 1643;" and his youngest son, Sir James Hope of Hoptoun, was appointed a lord of session, 12th March, 1649, twenty-eight months after the death of his father.

allowed to examine the witnesses, especially since that privilege is denied to the defender's advocate."\*

The office of macer of the court of session has been past all memory hereditarily vested in the family of Moncrieff of Readin, who discharges the duty by deputy, and Mr Moncrieff of course has the privilege of appointing his own deputy. In 1692, however, the lord advocate of that day, Sir James Stuart, baronet, disputed that privilege, which being carried before the court of session, the lords, by several votes, found the following points: "1mo, that John Adams' (the private party) right being now ended and transacted, the king's advocate could not insist for the king's interest; without a special warrant from his majesty, there being only two cases wherein he could quarrel (dispute) the subject's right, either by giving his concurrence to actions of one subject against another, or where he had a mandate from the king to that effect: otherwise he might vex all the lieges with processes, and open their charter chests."†

The king's advocate, and some of the vassals of the abbacy of Scoon, pursued a declarator against lord viscount Stormont, alleging that although he had a right to their feu duties till redeemed, yet he had no right to exact the services in their charters of harriage and carriage or the like, but the same belonged to the king their superior. It was asserted that it could be *no* process at the instance of the king's advocate, because he cannot pursue the king's vassals without a special mandate and warrant from his majesty, else he might *vex all the subjects*: to this it was replied, that it is only in reductions and improbations that the king's advocate requires a special warrant. Sundry of the lords were clear to sustain the process, but others thought it *mali exempli*, a bad example, that such unfavourable pursuits should be encouraged, (for they found that the king's advocate cannot insist alone,) and they *refused* process, till the titles of the vassals were given out to be seen *in communi forma*.‡

Stair says, that in contraventions, the king's advocate must concur for the king's interest, but he cannot insist alone, as when the private party hath discharged the deeds, even after the intenting of the cause.§ Reductions with improbations must proceed at the instance of the king's advocate, and for the king's interest; and therefore it must proceed upon a bill. The reason of the advocate's concurrence is, because the improbation is criminal, if the writ be produced; and the lords' decret of improbation is the chief ground of capital punishment for forgery.|| The king's advocate can prosecute for usury, without the concurrence of the party; but if he does concur, then the party is entitled to restitution of the interest over the legal rate which he may have paid.¶

\* Sir George Mackenzie's Works, II. 228.

† Ibid., I. 761.

§ Stair's Institutes, 69.

† Fountainhall's Decisions, I. 553.

|| Ibid. 619.

¶ Ibid. 139.

It was at no period of time competent by the law of Scotland, for any private person, other than the party himself who had suffered damage in his person, estate, or reputation, or, in case of his death, his next of kin, to prosecute crimes, however atrocious, the crime of high treason only excepted; and this rule obtains at this day in treason itself. On the other hand, his majesty's advocate, who in this question represents the community, has authority from the sovereign, who, inherently possessing the executive power of the state, sues every criminal without the concurrence, or even contrary to the will, of the injured party. But his power of prosecuting criminals extends no farther than the *publica vindicta*, or the satisfaction of public justice is concerned: the private party has a right of action against the offender for reparation of the injury: in which action, however, though it be pursued merely *ad civilem effectum*, the king's advocate must concur, because it arises from a criminal cause; and a sum is, by the decree proceeding upon it, awarded to the pursuer in name of damage, as a sort of compensation for the wrong done to him, proportioned to the enormity of the offence, though in fact he should have suffered no pecuniary loss.\*

Hume says, that in popular actions, as in many others relative to crimes, the law of Scotland has departed from the Roman law, which invited every citizen to prosecute for any offence that could be considered as injurious to the public. With a wiser and more salutary policy, and one which is far more suitable to our frame of government and state of society, our law has confined this important privilege to two descriptions of character—the party injured by any offence, and his majesty's advocate, who prosecutes for the public interest, and in the name of his majesty, as guardian and administrator for all his people, of the laws which secure their tranquillity and welfare. This has been so long the settled maxim, that it may almost seem strange we should have a judgment to cite in its confirmation, within the later periods of our practice. In the trial, however, of one Crosbie, which took place on the 30th August, 1616, for sundry acts of stealing cattle, where the private accuser seems to have insisted for injuries done to others, as well as for his own: “The justice finds nae proces at thir instance, for any crime committit and done to uthirs, except either the persones, owners of the goods stowin (stolen), or the king's advocat war present, and insistit in the pirsute of the pannel therefor.”

There are two titles of prosecution acknowledged in the law of Scotland: 1. The private party injured may prosecute with the lord advocate's concurrence, which concurrence or agreement his lordship cannot with-

\* Erskine's Institutes, B. IV., tit. 4. sec. 2

hold; he is obliged to give it: and, 2. That of the lord advocate, who prosecutes in the king's name. Private prosecution is not now of frequent occurrence, which Mr Hume says "is one symptom of the more vigorous and wholesome administration of the laws in our times:" yet, without doubt, private prosecution was the original, and for a long time the ordinary course of trial, for most crimes that concerned individuals. It is to be noted that the title of the private party embraces in every instance the full pains of law—not only the private interest of damages (*solatium*) and expenses, but the same high and personal conclusions of corporeal or other chastisement, wherein the lord advocate for his majesty's interest might insist. Thus, in cases of homicide, an indictment at the wife's instance, or the kinsmen of the deceased, is as good towards inflicting the highest vengeance of the law on the body of the culprit, if he is found to be a murderer, as it is in the case of culpable homicide for recovery of the assythment, or pecuniary consideration, which is then due to the kindred. In this case, "The bairnis, als weil bastardis, being mail or femail, as the bairnis lauchfullie gottin, sould be participant of the assythment decernit and adjudgit for their father's slauchter: bot the samin sould not be dividit equallie amangis thame, because the lauchfull bairn sould hae twise als meickle as the bastard, or utherwayes at the discretion of the judge."\* The true and obvious ground, therefore, of sustaining this private action, or *instance* as it is called in the law of Scotland, is the consideration of the just and natural resentment of the sufferer (with which the interest of civil order coincides), impelling him to seek the satisfaction of his wrong in the humiliation and punishment of the wrongdoer, to the degree which the law allows; a feeling which must be accounted blameless, when restrained within these limits, and applied in bringing the transgressor to a public and solemn trial for his crime. This point was the subject of an argument, in the trial of the notorious colonel Charteris for rape or attempt to ravish; where the action had been raised by the woman's husband, with concurrence of the lord advocate, and this concurrence was withdrawn at the diet of comparance. The court sustained process, and "repel what is objected to the competency, and find the libel relevant to infer the pains of law."

To support his *instance*, the individual complainer must be able, therefore, to show some substantial and peculiar interest in the issue of the trial; an interest arising out of some injury which he, beyond others, has suffered on the occasion libelled, and at which he is entitled to feel more than the ordinary indignation with which his fellow citizens will regard it. It is not sufficient, therefore, that he has some feeble and remote concern

\* Balfour's Practicks, p. 516.

in the issue, or one of a general nature, in common with a whole neighbourhood, or with all of the same order or class of society. It does not belong, for instance, to every minister of the church of Scotland, though interested certainly in guarding the purity, and maintaining the privileges of his own order, to prosecute for the celebration of clandestine marriage, or for intrusion into kirks by deposed or unqualified persons. In like manner, the keeping of a house of harbourage for thieves and vagabonds, is certainly a nuisance to the whole neighbourhood; yet it belongs to the procurator-fiscal only, or to him who can show a special damage, and not to every heritor or inhabitant of that district, to insist for the punishment of the master of such a house. Again, let us suppose that the sittings of a court of justice are interrupted by a mob; or that a riot happens on occasion of the settlement of a minister, whereby the peace of the parish is disturbed, the ordination hindered, and the congregation deprived for a time of the regular performance of religious worship; still it cannot be maintained, that every litigant in the one case, how urgent soever his cause, or every member of the congregation in the other case, or even every heritor of the parish, can stand forth as avenger of this public wrong, and prosecute for the ordinary pains of riot, or the insulting of clergymen or judges. But the patron of the parish has a good title to do so, because he has been peculiarly injured by this resistance of his lawful right. This indeed is not a fictitious, but a real case, and one which received judgment accordingly, in the case of Gillies, Gray, and others, in the year 1751. The prosecution was for certain riots, on occasion of the settlement of a minister in the burgh of Lanark, at the instance of Lockhart of Lee, as patron of the parish, and of certain other persons as heritors for themselves, "and in behalf of the other heritors, elders, and christian people of the parish." The court sustained the patron's title, but repelled that of the other individuals.

Under modification the practice of the law of Scotland sustains the title of a private complainer, in respect of injuries of almost every kind. Whether it be the injury of bodily pain, or disability, as in the case of battery and mutilation; or of insult and fear of mischief, as in the case of attempt to ravish, or a threatening letter, or challenge to fight; or of putting one in danger, as by malicious information of a crime; or of the loss of liberty, as by wrongous imprisonment; or of the loss of domestic comfort, as in the case of adultery; or of fame and respect, as in the slandering of a judge; or of a violation of one's natural sentiments of affection, as by raising the dead body of one's child from the grave; or of patrimonial loss, either done or intended, as by theft, forgery, deforcement, perjury, or subornation in any civil process (and this whether the prosecutor have won or lost his cause); or of loss and disappointment of any

sort, as in the case of bribery in opposition to one's interest, as candidate at an election : all these are such wrongs as bestow a title on the sufferer, to accuse and bring the author of his injury to justice. Either the complainer seeks some immediate reparation from the wrongdoer; or he has suffered some harm from him; or he has had a criminal attempt directed against him, for which he may justly feel resentment, and seek an atonement, in the humiliation and disgrace of the offender. Besides, in all these instances, the sufferer has the farther substantial interest of deterring the transgressor, by means of the due chastisement, from the repetition of similar aggressions against him for the future; and of thus regaining his peace of mind, and opinion of security in the enjoyment of his rights. With respect also to the application of the private prosecution, the law of Scotland seems to know no distinction between the more atrocious and the lower wrongs. If the wrong be one of that degree, for which the lord advocate in his majesty's name, and for the public interest, might insist in a criminal court, the same regard is due to the just complaint of the immediate sufferer on the occasion. In certain cases, the law of Scotland allows a right of prosecution to the kindred of the injured party; for there are injuries so atrocious and extreme, that the distress and disturbance, as well as the other evil consequences attending them, affect not only the immediate sufferer, but also those who are nearly allied to him; so that, in truth, on those occasions they prosecute for an injury done to themselves. On this ground, the near kinsmen of a person murdered have a right to bring the murderer to justice, it being clear that the chief sufferer cannot himself do it. In cases of rape, or attempt to ravish, the husband or the father is allowed to avenge the injury offered to his wife or daughter, more especially as the female may be averse to prosecute in her own person. Thus, in the case of Cheyne and Bowman, an action for a rape was sustained at the instance of the woman's father, though it was objected that she herself, being of perfect age, did not join in the prosecution. In another case of rape, the stepfather insisted in his own name, and for the woman and her mother. Colonel Charteris was sent to an assize, and damages recovered, although the lord advocate had withdrawn his concurrence. A tutor, likewise, who has the care and custody of the person of his ward, may prosecute for the infringement of his right, and the injury done to himself, as well as her, by rape, forcible marriage, or violent abduction of her person.

It is, however, only to crimes of a personal and very atrocious nature, that the law listens to this call for vengeance on the part of the kindred of the deceased; because wrongs of a lower degree, or only of a patrimonial nature, do not excite the same lively interest or distress in the kindred of the sufferer. With him, therefore, the right of prosecution expires.

So far, indeed, as his heir or executor has any patrimonial interest on such an occasion, as for damages or recovery of the stolen goods, or improbation of the forged writing, the civil court will receive his process; but an action concluding for corporal pains, or even a fine or eachet of goods, on account of an ordinary assault, or the like, committed on the deceased, it is at least more doubtful whether the kinsman can insist for the lord advocate's concurrence; because the pain and distress were personal to the deceased, and his kindred are not supposed to be so deeply affected by the wrong on such occasions. A private prosecutor's action or libel cannot be raised at his own pleasure, but must be raised with the concurrence of his majesty's advocate, for his majesty's interest; and truly receives his concurrence by the king's advocate's subscription of the bill for the criminal letters, or of some one authorized by him. This practice is grounded on two considerations: first, his majesty's interest in the fines, forfeitures, and confiscations that accrue from convictions; and his majesty's interest is thus guarded against any collusive dealings between the private accuser and the offender: and next, that far superior interest which the king has in the execution of his laws, and especially in the due and equal distribution of criminal justice to all his subjects; in which view it is fit the lord advocate be informed of any libel when it is raised; that he may learn the nature of the charge, and watch over the conduct and progress of the trial, so that the ends of public justice may be fulfilled, and the king suffer no prejudice, by private hands assuming this interesting discipline. This concurrence, therefore, is necessary alike to every libel in the court of justiciary, whether it conclude for the full pains of law, or only for a pecuniary reparation to the party; for still the interest of public justice is concerned in the issue, and the pannel is so far punished and corrected, as he is made liable in those patrimonial consequences of his wrong. Indeed, to such a length is this notion carried, that the lord advocate must concur in the ordinary civil action even of reduction and improbation, as it is called, though only laid by fiction upon criminal grounds.

“But is it therefore our law,” asks Mr Hume, “that the lord advocate has the interest of the individual absolutely in his hands, and by refusing his concurrence may at his pleasure suppress the private instance, and protect the transgressor from the just consequences of his crime? I know not whether the rule on this head is so far peremptory as to deprive the lord advocate of all exercise of his judgment on such occasions, and constrain him absolutely to lend his name to every libel, how absurd and incompetent soever, which any individual shall lay before him. For what if his concurrence be asked to a charge of witchcraft, which a statute has expunged from the list of crimes; or of treason, for which no private party can prosecute; or of murder, at the instance of some stranger, who does



not even allege that he is any ways related to the deceased?" Mr Hume thinks it is hardly to be imagined, that he is obliged to degrade his office, and give trouble to the court, by leading his name, in *limine* even, to such strange proceedings. On the other side, certainly the lord advocate is not the absolute and unaccountable judge on such occasions, but is subject to the control or direction of the court, who will oblige him to produce, and justify the ground of his refusal to concur. Nay, more; except in such extraordinary situations as those above supposed, he shall not even be allowed to engage in any inquiry concerning the merits of the case, the propriety of the prosecution, the form of the action, the sufficiency of the title, or the like, but shall be ordained to comply straightway, leaving their discussion for the proper place and season, after the libel shall be in court. Such an order was given accordingly, on occasion of the only complaint of this sort that appears on record. In 1633, Sir Thomas Hope, lord advocate at that time, had refused his concurrence to certain actions, as in his opinion prejudicial to the interests of the crown. This being complained of to the court of session, "they ordain the advocate to subscribe the said bills, it being warranted by the general order and practise hitherto observed in this judicatorie; but declaring at the same time, that his majesty's advocate is noways thereby debarred from appearing for his majesty's particular right and interest, to defend and oppose against the said pursuits." If, therefore, this was thought a competent and lawful course in the civil court, and with respect to a process of an artificial character, it may reasonably be inferred that the court of judicatory would not decline to interfere in the case of a proper criminal process before themselves; and accordingly Mackenzie in his observations on the statute 1587, c. 76, goes so far as to say, "as parties may pursue crimes without concurrence of the king's advocate, so by this act, the king may pursue without an informer, *ad vind. publicam*." And although it does not amount to a judgment on the point, yet it is a confirmation of the right of the individual to force the reception of his complaint, that in the case of colonel Charteris, where the lord advocate's concurrence was formally withdrawn at the calling of the libel, still, after a full argument, the trial went on at the instance of the private complainer. In the case, which sometimes happens, of mutual libels being raised by the private parties against each other, on the same or partly the same facts, the lord advocate may, and indeed must give his concurrence to the action of either party.

Another peculiarity of a prosecution at a private instance, is, that before entering into the relevancy of the charge, or opening up the case on his own part, the pannel, if he has any faith in such a remedy, may call on the prosecutor to *swear the libel* as it is styled: that is, to give his oath of calumny to the justice and sufficiency, in his opinion, of the grounds of

his accusation: a security which the law of Scotland has very properly provided, in addition to all others, and *in limine* of the process, that the pannel shall not suffer the anxiety and humiliation of being sent, even to an assize, unless on a charge which the prosecutor will publicly confirm with his oath, as founded in truth and justice. If the prosecutor decline to swear, the court will desert the diet of his libel. As every one is left to the free exercise of his own will, respecting the raising of a criminal process, so he is at liberty, after raising it, to debar himself by a written discharge or disclamation, as it is called, from insisting in that process, or even, if the expressions are broad enough, from raising any such complaint on the same ground for the future.\*

The king's advocate cannot prosecute any action at the king's instance, tending to challenge the right of any of his majesty's subjects, without a special mandate to that effect; though he may give his concurrence to a process brought by one subject against another. In reductions of grants from the crown, custom has required a special warrant under the sign manual; yet it has been found that the king's advocate, without any special warrant, may insist in a declarator of the boundaries of the king's forest, because this is only protecting the rights of the crown from encroachments, and not cutting down the right of private parties.†

The office of lord advocate, who is the public accuser, and insists in the king's name and for his interest, in the execution of the laws, and for the tranquillity and welfare of his people, though it probably existed at an earlier period, is not much noticed before the beginning of the 16th century; and according to the common account it was raised to its present high privilege with respect of the prosecution of crimes by the statute 1587, c. 77, which declares, "that the thesaurer and advocate persew slaughters, and utheris crimes, althoucht the pairties be silent, or wald urtherways privily agree." But that this is not quite accurate, may be inferred from an older statute,‡ which fixes the penalties of calumnious prosecution, and provides particularly for the case of a process at the instance of the lord advocate only: "and gif the kinge's majestie's advocat be onlie persewer, his informer to pay the paine foirsaid." It is obvious, with respect to crimes of a public nature, such as treason, sedition, blasphemy, and several others, for which no private individual ever had a right to prosecute, that there must always have been some regular course of complaint, wherein such offenders might be brought to justice. And further, with respect to crimes injurious to individuals, if they were also of a nature interesting to the public, the king seems always to have been a competent accuser. The title of the act 1436, c. 140, is, "trespassours

\* Hume on Crimes, vol. ii.

† Brown's Synopsis, vol. ii. 1187.

‡ 1579, c. 78.

may be accused at the king's instance *allenarly*;" and the statute itself ordains generally, "that all maires and serjeandes arrest at the schirriff's bidding, albeit that nae pairtie follower be, *all trespassours*, and that the said schirriffe follow the said trespassours *in the kinge's name*, gif nae pairtie followeris appearis." And again, the statute 1424, c. 20, entitled, *of mureburning*, after fixing the penalty of the trespass, has this express provision: "and gif the lord of the land raises not sick pair, nor punishes not sick trespassoures, as is befor said, the justice-clerk, be (by) the indictment, sall gar sick trespassoures be corrected befor the justice, and punished as said is." Which words show the course in which this sort of business was then prepared, and which, according to the whole series of the Scottish statutes of the fifteenth and part of the sixteenth century, appears to have been: that, after information had been taken in the several counties under the brieve of dittay, the justice-clerk at the command of the justiciar, made up from these materials what was then called *the Porteous roll and traistis*; that is, a roll of the names of the delinquents, and a file of the suitable indictments against them. And it lay with the same officer to expedite the necessary precepts towards the trial of those charges, and to issue his orders to the *crowner*,\* to arrest the delinquents and lay them in ward, or take surety for their appearance. In performing this service the justice-clerk acted substantially for his majesty's interest, and for the benefit of public justice and example. In framing his indictment, he neither inserted the name of his majesty, nor of the lord advocate, nor of any other person as accuser, which continued to be the style down to the end even of the 17th century. In the indictment of Arnott and other rebels taken at Pentland in 1666, the style was: "Ye and ilk ane of you are indicted and accused; for that albeit by the common law," &c. And in another case, in 1681, the *earl of Argyle's* indictment was, "You are indicted and accused, that albeit by the common law," &c. Both of these were cases of very great importance, and were tried with more than usual solemnity. Nevertheless, in all such charges, after they were brought into court, it was the lord advocate's duty to insist in, and bring them to an issue: on which account, even in the oldest books of adjournal, he is marked in the *partibus*, as counsel for the crown, "for the *persemar advocatus*." In effect, therefore, though not set down as such, in *gremio* of the charge, the lord advocate was prosecutor for his majesty's interest, and was master of the *instance*, which he might desert, restrict, or bring to an issue, as he saw cause. And, on the whole, Mr

\* The office of coroner, though now unknown to the law of Scotland, was formerly of some importance in it. One principal part of his duty seems to have been, by arrestment of the person, effects, or otherwise, to secure the appearance of offenders for trial, and this he did by precept from the justice-clerk.—*Hume*, ii. p. 24.

Hume thinks it probable, that the act of James VI.,\* which allows the lord advocate to pursue, though the parties themselves "be silent or wald utherways agree," is to be understood of that form of prosecution only, wherein the individual must have insisted; namely, by summons or criminal letters, bearing the name of a complainer, and citing the accused to a particular day of trial. That statute, however, certainly added to the advocate's consequence, who now openly sustains the person of his majesty, and wields the law in this interesting department; and it is said that soon after the passing of the above act, in the trial of Arnott of Woodmilk, in the year 1598, he was marked for the first time in the record under the title of *lord advocate*, which title he has ever since retained.

The right of prosecution was vested alike in the office of treasurer, as well as of the lord advocate, by the fore-mentioned statute of James VI., for it was one of the objects of that statute to secure his majesty's interest in the fines, confiscations, and forfeitures occurring on those occasions, against the collusive dealings of the pannels and private accusers, to the disappointment alike of the royal revenue, and the interest of public justice. But Mr Hume thinks there is not any precedent on record of a prosecution at the treasurer's instance. Neither does this high privilege belong to his majesty's solicitor-general, nor to any other of his law officers, *jure officii*; though there is nothing to hinder his majesty, at least when there is no lord advocate, from throwing such a power into the commission of the solicitor-general, or authorizing that officer, or perhaps any other lawyer, by a special letter, to pursue and insist against criminals in like manner as the lord advocate may do. In fact this was done in 1713, in consequence of the death of Sir James Stuart, then lord advocate. It appears that the office of lord advocate has been vested at the same time in a plurality of persons; for, in the trial of John Young, Sir William Oliphant and Mr Thomas Hope are both marked in the record, as "advocates to our sovaine lord."

After what has been said regarding the offences for which the lord advocate may prosecute, it is almost unnecessary to add that his privilege is hardly subject to any limitation. For all those crimes which are properly of a public nature, such as treason, sedition, blasphemy, riot, incest, being an Egyptian, harbouring of thieves, smuggling, forestalling, and the like, he is the only prosecutor; because the reasons for vindicating these wrongs are of a general and an extensive kind, wherein all the lieges have indeed a certain interest, but as members only of society, and not one of them more than another. As to those offences, whether high or low, for which the injured party may also prosecute, and whether he be, or be not disposed

\* 1587, c. 77.

to concur in doing so: still the lord advocate has a right by the act 1587, to complain of them in his majesty's name, as guardian of his laws and of his people's morals, and to insist for the due chastisement of the offender.\*

The lord advocate, therefore, is the public prosecutor for crimes, all over Scotland; and, in one sense, independent of the party injured, and it is absolutely under his own management and disposal, as to the seasons and occasions when, and the mode wherein, or the effect to which he shall use his power. In none of these points can any individual, not even the supreme court itself, pretend in any way to control or superintend him: indeed, to allow of the court's interference, would be in reality to make the judges prosecutors, (contrary to every idea of justice,) who ought to be pure, and ignorant of all previous impressions of the case. But if the lord advocate is deficient of the due discharge of the duties of his office, the proper channel for redress is by petition to his majesty in council, at whose pleasure the office is held, and who will order an inquiry into the grounds of such complaint.

The lord advocate is also master of *his instance*, so that even after he has brought his libel into court, it rests entirely with his own discretion, to what extent or effect he will *insist* against the culprit; and he may freely, at any stage of the process, before a verdict is returned, nay after it has been returned, but before judgment has been pronounced, restrict his libel to an arbitrary punishment in the clearest case, even that of a capital crime. Established practice surrounds the lord advocate with peculiar and great privileges: he is not required to find security for reporting or insisting on his criminal letters; nor can he be called on to take his oath of calumny; nor, in the case of a verdict of acquittal, is he liable in any of the statutory penalties, for rash and calumnious accusation. Nevertheless, that the subjects may not be altogether deprived of security against such wrongs or the means of reparation, the statute 1579, c. 78, has expressly ordered, that in cases where the king's advocate alone prosecutes, the statutory penalties shall be paid by his informer; which infers the necessity of the king's advocate to name his informer, that the injured party may have access to him for the recovery of damages.†

To enable the lord advocate to discharge the duties of so important and laborious an office, he is empowered to name deputies to act in his name during his absence. These are the solicitor-general, and three advocates-depute, to which a fourth has been added to attend the winter circuit at Glasgow. His lordship is responsible for their proceedings, but in all cases of difficulty they are regulated by his advice. The

\* Hume on Crimes, ii.

† Ibid. ii. chap. v.

deputies may prosecute in any court in the kingdom, and are not liable for expenses, as they act in the name and on behalf of the crown, which, by the law of Scotland, neither pays nor claims expenses in any criminal case whatever. These public officers generally prosecute before the high court of justiciary, the powers of which extend all over the kingdom, and whose circuits travel twice a-year through its most populous counties. When a crime has been committed in any county or burgh of Scotland, such as murder, robbery, rape, fire-raising, housebreaking, theft, &c., information is immediately lodged by the injured party, with the procurator-fiscal of the burgh, county, or district where he resides, who makes out a written complaint, which must be signed by the informer in terms of the act of 1701. And in no case can any magistrate commit a prisoner without this signature; and, as mentioned above, if the accusation be groundless or malicious, the informer becomes liable for the whole damages. Should a magistrate commit without that signature, or just grounds, he himself becomes liable for the penalties. This committal, in the first instance, is for further examination, in order to give the injured party time to collect his evidence. It has been decided, that this commitment cannot legally extend beyond seventeen days, without subjecting the parties occasioning it to damages and expenses. When the evidence has been collected, it is reduced to writing, for the purpose of submitting it to the crown counsel, and, if necessary, as serving for their brief on the trial. This duty devolves on the procurator-fiscal, in the presence of the sheriff, magistrate, or justice, before whom the prisoner is taken; and they are responsible for its accuracy. This is called a *precognition*, and if there appear sufficient grounds for committal, the sheriff, &c., grants a warrant accordingly. Immediately on its signature, the prisoner may apply for bail, if it is a bailable offence: by statute\* the justice must determine within twenty-four hours whether it is a bailable offence, and also fix the amount of the bail.

After commitment, the *precognition* is immediately forwarded to the crown counsel in Edinburgh, and laid before the advocate-depute for the circuit where the crime was committed: if the case is clear, he decides himself on the prosecution; but if it is of importance, or is attended with difficulties, he takes the opinion of the senior law officers of the crown; when, in either case, an order is immediately given to detain the prisoner for indictment, or forthwith to set him at liberty. If the crown counsel order the prisoner to be discharged, he is set at liberty so far as the commitment by the crown is concerned. But the injured party may prosecute at his own instance and risk of damages with the lord advocate's

\* 39 Geo. III., c. 49.

concourse, which the court will compel him to grant, but which in practice, however, is never refused.

If the crown counsel find that there is sufficient ground for prosecution, but that the case would terminate in a fine or short imprisonment, it is remitted for trial to the inferior judge before whom the proceedings originated. But if the crime appear to be more serious, and the evidence complete, the crown counsel direct the accused to be detained for indictment; and generally the same counsel who gives this direction, is obliged to prepare the indictment, attend, and conduct the trial himself. The crown counsel are paid fixed salaries, and have no interest whatever in increasing the number of prosecutions, but, on the contrary they thereby augment their own trouble. If they decline to prosecute when there is good evidence, their professional character suffers an irreparable injury, should the private party prosecute to a successful issue.

The advocates-depute are generally men about thirty years of age: the immense increase of criminal business, compared with the small amount of their salaries, rendering it impossible to find senior practitioners of any eminence, who will undertake the office. It has not, however, been found, that this department of the public business has been either negligently or unsuccessfully conducted; and the greatest lawyers of whom Scotland can boast, have begun their career, and been trained in this school.

When the case is to be prosecuted by the crown, the proceedings are prepared and the trial is conducted at Edinburgh; and, if the case occurs in the high court, it is under the immediate directions of the lord advocate. If it is on the circuit, the indictment is prepared by the advocate-depute who has been appointed for that circuit. In the indictment the same minute and scrupulous accuracy is required which is exacted in an English prosecution; and many particulars must be added for the prisoner's information, which in their practice are not essential. In particular, not only the specific offence itself charged, but the mode in which it was committed, must be recounted with scrupulous accuracy; the place where the crime was committed must be correctly described by its name, parish, and county; all articles to be used in evidence, must be minutely and accurately described, and submitted to the prisoner's inspection previous to his trial; and a list of witnesses must be annexed to the indictment, containing an accurate description of every witness, by his name, profession, place of residence, parish, and county. The smallest error in any of these particulars, will exclude the prosecutor from the benefit of that article, or witness, at the trial. A copy of the indictment must be delivered to the prisoner by an officer, containing all these particulars, fifteen free days at least before his trial, with a list of the assize, and of the witnesses who are to be adduced against him. If there is any variation, except an

unimportant clerical error, between the copy delivered to the prisoner, and the record copy of the indictment and list of witnesses, it casts the indictment. Before the prisoner can be called on to plead to the indictment, the prosecutor must produce written evidence of its delivery to the prisoner, with the list of witnesses and assize, by a written statement signed by the messenger and witnesses, or "execution," as it is technically called, setting forth the delivery of these important documents. This writ must be scrupulously accurate, and the least error in it entitles the prisoner to postpone his trial, and exposes the officer to the risk of censure or deprivation of office. If a witness declares in court that his name, surname, profession, place of residence, parish, or county, vary in the slightest degree from the description contained in the indictment, it excludes his testimony on that trial.\*

The witnesses are not examined in Scotland in presence of each other, as is done in England. As soon as the trial commences, the witnesses are enclosed by themselves in a separate apartment; and it is sufficient to cast a witness, if he has heard any part of the evidence given by any other witness, or has had any communication with the prosecutor subsequent to his citation. The rule invariably followed in Scotland, of compelling the prosecutor to close his evidence before the proof in exculpation begins, gives the prisoner a greater advantage than is enjoyed in the English courts; because he has the benefit of knowing the evidence against him, whilst the prosecutor is almost always ignorant of the line of defence which he may adopt, and cannot produce farther evidence to counteract his defence.

The assize consists of forty-five persons, or three juries, summoned regularly in rotation, by the sheriffs of the counties. From this list the jury is selected by ballot; each prisoner having a peremptory challenge to the extent of five, and of any number, if he can show cause for their rejection. Prisoners are allowed counsel; and if they are too poor to retain them themselves, counsel are assigned them by the court, which duty no advocate is permitted to decline. If none are present, then the sheriffs of counties, who must be there, are obliged by the court to act as counsel. For many years the immortal author of *Waverley*, who was sheriff-depute of Selkirk, was regularly nominated to that office at the Jedburgh circuit; and his unrivalled talents, which have established a new era in fictitious writing, and astonished the whole world, were often gratuitously and successfully exerted in the defence of the humblest and most destitute prisoners.† From the great competition at the bar, this duty seldom devolves on the sheriffs, as many young advocates travel the circuit, at a heavy expense to themselves, for the purpose of acquiring information and distinction in their profession.

\* *Alison's Practice*, Preface.

† *Ibid.*



It is a rule of Scottish evidence, that the prisoner can only be convicted on the testimony of two witnesses, or of one witness, supported by such a chain of circumstantial evidence, as is obviously equal in amount to the evidence of another. In purely circumstantial evidence, a much clearer chain of circumstances is requisite to convict in Scotland, than is considered essential in England.

On the conclusion of the evidence on both sides, the jury are addressed by the crown counsel, and also by the counsel for the prisoner, who is always entitled to the last word. The prosecutor is never allowed to reply; but whether in arguing points of law to the judge, or matter of evidence to the jury, the prisoner's counsel is heard last in defence, which gives him an immense advantage, and the legal subtleties of his counsel frequently so embarrass the minds of the jury, as induces them to return a verdict of NOT PROVEN. If the jury cannot agree on their verdict before the court adjourns, their verdict, which is usually oral, must be reduced to writing, and delivered to the court sealed, and no explanation or amendment can be admitted after it is opened. And if it does not in every respect tally with the indictment, the whole proceedings are null, and the prisoner entitled to an acquittal; and in practice this occurs so frequently, that a written verdict is considered by the bar as affording no inconsiderable chance of a technical error, and consequently of the prisoner's escape. But whether the prisoner escape by this technical informality, or be duly acquitted, the benefit is the same to him: he can never be again tried or imprisoned for the same offence, not even by an alteration in the mode or name of charging the offence.\*

Previous to moving for sentence, the king's advocate has the privilege of "restricting the libel," to any punishment short of death, or of entering a writing upon the record, which disables the judge from pronouncing a capital sentence. This important privilege is not confined to the lord advocate and his deputies, but is enjoyed also by private prosecutors, when pursuing with the advocate's concurrence. It is thought that this necessary and important power is most appropriately intrusted to the king's advocate, whose knowledge of the case is more minute and circumstantial than that of the presiding judge—is acquainted with the comparative atrocity of all the cases from the same district—with whose duties, as acting for the crown, this power seems to be more consonant,—and who holds a situation more amenable to the bar of public opinion, and against whom public censure or complaint may more fearlessly be directed. This is a power which can only be exercised in favour of the prisoner; it can only be abused on the side of mercy, but cannot become an instrument of oppression.

\* Alison's Practice.

In practice, however, many important cases occur, in which, though there may be reason to hope that the life of the prisoner will ultimately be saved, the lord advocate feels that it is beyond the proper line of his duty to restrict the libel, or when he feels that the act of mercy would come with more grace from the crown. In which case the royal mercy is still open to the unfortunate criminal; and in such case the presiding judge never fails to transmit such an account of the trial as ensures a conditional pardon. From the extent to which the lord advocate carries this power of restricting the libel, sentence of death is seldom pronounced without its being carried into execution. And accordingly the effect of a sentence of death on the audience, and the criminals themselves, is greater than those accustomed to the practice of other countries would imagine. Nevertheless, there are not, on an average, more than eight or ten persons executed annually in the whole kingdom.

It has recently been enacted,\* that no capital sentence shall be carried into execution in less than fifteen days from its date on the south side of the Forth, or twenty days if on the north side of that river; which affords time for the wretched criminal to make his peace with God, whose laws he has violated; and instances frequently occur, in which the prisoner, from the opportunity afforded him during that melancholy interval of collecting evidence in support of his petition for the royal mercy, is saved from an ignominious death, from which he would have no other chance of escape.

In Scotland, prisoners have the power of forcing on their trials; and consequently shortening the duration of their confinement. When committed to gaol, the act of 1701, which is the Scottish Habeas Corpus act, ordains that he shall be furnished with a copy of the warrant for his being committed, and the petition on which it was granted. Which documents acquaint him with his accuser; the grounds of the charge preferred against him; and, besides, the means of establishing his innocence. But if he is desirous of forcing on his trial after being committed, the same statute entitles him to take out letters of intimation against both his accuser and the lord advocate. The purport of these letters is to demand that his trial shall take place within the period fixed by the act of 1701; under certification, that if it be not done, he shall be set at liberty. This proceeding costs about two guineas, but is seldom exacted from indigent prisoners. On the execution of these letters, the lord advocate is obliged to indict the prisoner within sixty days, and to bring the trial to a conclusion within forty days thereafter. This obliges the trial to be conducted at Edinburgh, in the intervals of the circuits. If the lord advocate neglect to serve the indictment at the expiration of the sixty, or the trial be not

\* 1 Will. IV., c. 37.

concluded before the expiration of the hundred days, then the prisoner must instantly be set at liberty, under the penalties of wrongous imprisonment to the party. These the act 1701 declares to be, for a nobleman, £100 Scots; for a landed gentleman, £66:13:4*d.*; for a burghess, or other gentleman, £33:6:8*d.*; and for inferior persons, £6:13:4*d.*, for each day that he is wrongfully detained. The magistrate or gaoler who fail instantly to obey the provisions of the act, subject themselves to the above penalties. Having in this manner obtained his liberty, the prisoner can no longer be apprehended by any magistrate's warrant, and can only be again imprisoned upon criminal letters issuing from the high court of justiciary, and especially delivered to himself. These letters contain a full indictment, with a list of jury and witnesses; and the statute is express, that unless the object of these criminal letters is brought to trial within forty days after his apprehension, he shall be at liberty, and *be for ever free* from all prosecution for the offence, at the instance of the king's advocate, or any other party. If the prisoner has not availed himself of the provisions of the act 1701, the lord advocate, or any of his deputies may, on the trial, *move* the court to desert the diet, *pro loco et tempore*, that is, to postpone the trial to a subsequent day. On sufficient cause shown, such as the absence of a material witness, the court will grant the indulgence, and recommit the prisoner; and on a similar application, and for similar cause shown, will allow the prisoner the same indulgence. The court shows a laudable jealousy of the lord advocate's motives, and on the least indication of oppression will compel him to proceed with the trial; and in default of his doing so, will desert the diet *simpliciter* against the prisoner, and ordain him to be set at liberty.

The lord advocate cannot imprison any person at his own discretion, or detain him in prison till he obtain his liberation under the act 1701. He has no power, as lord advocate, to imprison any person whatever. He can only present a petition to a magistrate, praying for a warrant of commitment; a power which he shares with every individual in the kingdom; and the committal, in the first instance, can only be for examination; and if the prisoner is detained under that warrant more than a reasonable time, say eight or ten days, both the magistrate and private informer are liable in damages. After examination, the magistrate can alone commit the prisoner for trial; and if he should do so without sufficient reason, he acts at his highest peril, and subjects himself in damages to the injured party, whether the application for imprisonment was made by a private prosecutor, the procurator-fiscal, or the lord advocate.\* It has also been decided, that a prosecution cannot be suspended over the head of a pannel for an indefinite time; and it is a mistake to imagine that the act 1701 affords no

\* Hume on Crimes—Alison's Practice of the Criminal Law of Scotland.

means of forcing on a trial, except to those who are actually in prison. If he has once been committed to stand trial, he becomes entitled to the whole benefit of the act of parliament, of which he cannot be deprived, either by finding bail, or by the prosecutor consenting to his liberation.

Such is a brief outline of the law and practice of Scotland, and of the powers of the lord advocate,—powers almost unlimited. He represents the king's person; he wields all the power and prerogatives of the crown, without any other control than that of public opinion; he is the minister of the crown for Scotland, and the greatest personage in the kingdom, and in some respects superior to the court before which he pleads, having the gentle prerogative of mercy within his own breast, by the power of "restricting the libel," a power which the court does not possess, in such cases where, from his intimate knowledge of circumstances, he judges it proper to save the prisoner from the penalty of death :

" ————— O it is excellent  
To have a giant's strength; but it is tyrannous  
To use it like a giant."

Notwithstanding such transcendent powers, there are scarcely any instances on record, of any lord advocate having abused them for the purposes of cruelty or oppression, but on the contrary, this peculiar prerogative has always been exerted on the side of mercy.\*

## LORD LIEUTENANT AND PARLIAMENT OF IRELAND.

It is matter of dispute whether Ireland became subject to the crown of England by cession or by conquest; perhaps in reality by both: however, since the armed interference of Henry II., the kings of England have been acknowledged as sovereigns of Ireland, and have intrusted its administration to the hands of viceroys. At first they were styled keepers or wardens of Ireland, afterwards justices or deputies, and now lord lieutenants; and in their absence, the temporary governors are called lords justices. The power of the lord lieutenants is ample and royal: they were vested with power to make war; to conclude peace; to bestow all offices and preferments, except a few; to pardon all crimes, except that of high treason; to confer the honour of knighthood; and no viceroy in Europe comes so near the state and majesty of a king, in jurisdiction, authority, train, fortune, and provision, as the lord lieutenant of Ireland.

\* Bell's Dictionary—Hume on Crimes—Fountainhall's Decisions—Sir Geo. M'Kenzie's Works—Alison's Practice of the Criminal Law of Scotland—Brown's Synopsis—Darling's Practice—Beveridge's do.

He is assisted with a privy council formed in the same manner as that of England, consisting of the lord high chancellor, and others of the nobility, bishops, judges, and gentry. When any nobleman enters on this high office, the king's letters patent appointing him are publicly read, after which he takes a solemn oath, in a set form of words before the chancellor, when the sword, which is to be borne before him, is delivered into his hand; and then he is placed in a chair of state, being attended by the lord chancellor, the members of the privy council, the peers of the kingdom, with a king at arms, a sergeant at arms, and other officers of state.

Assemblies of the prelates, nobles, and commons, were at several times convened as colonial parliaments, or representatives of the English in Ireland; but the first which was regularly and formally assembled in Ireland was in the year 1295, in the reign of Edward I., under Sir John Wogan, the chief governor, in consequence of an invasion from Scotland under the illustrious prince Edward Bruce. Besides summoning the temporal and spiritual lords, the writs to the sheriffs directed them to return two knights for each county and each liberty, or privileged district included in a county. But their transactions clearly exhibit the incomplete character of these parliaments, as legislative bodies, at that period. First principles were acted upon in the most simple way possible, each community granting subsidies for itself. And as the counties, cities, and boroughs had then the *option* of electing two, three, or four representatives, it shows that their functions were confined merely to counsel; and also that the general parliament of that day was no more than a meeting called by the king for the purpose of granting him a subsidy. The word parliament, in the common acceptance, meant the *aula regis*, or king's high court of justice, where his ordinances and decrees, which are now called statutes, were enrolled, and consisted of his greater barons, including the archbishops, bishops, and such of the abbots and priors, as possessed baronial authority in their respective liberties.\*

An entry in the Black Book of the church of the Holy Trinity, Dublin, of the year 1297, shows that the component parts of that parliament consisted of archbishops, bishops, abbots, and priors, "whose presence seemed to be necessary," earls, and the rest of the *optimates* of the land, that is, two knights elected in county court, summoned by the sheriffs, and two knights elected in the courts of the various liberties, summoned by their seneschals; but no writs were directed to the cities and boroughs.† From the reign of Edward II. till that of Henry VI., there are no acts of parliament recorded in the statute books; but it appears that parliaments were held in the seventh, eighth, tenth, and twenty-fifth years of his reign,

\* Sir William Betham's *Dignities, &c., of Parliament*, i. 280.

† *Ibid.* p. 261.

under three different chief governors; and from the twenty-eighth year of his reign, they were summoned almost every year under the duke of York, who was lord lieutenant for ten years. Eight parliaments were summoned during the short reign of Edward IV. During that reign a law was passed, which enjoined the residence of the clergy, under the penalty of forfeiture of their benefices for a year's absence, and taking away the benefit of the king's license; also an act prohibiting appeals to England. This last act was prejudicial to the rights of the crown, and perhaps gave rise to that famous law of Sir Edward Poyning's, in the reign of Henry VII. In the tenth year of this monarch, a number of laws were passed of great importance; the chief of which were that which authorized the treasurer to create delegates, and gave the officers of the treasury the same powers as those in England; the statute which adopted all the laws of England, antecedent to that period; and lastly, the famous act, emphatically called *Poyning's law*, which regulated the mode of summoning parliaments, and of passing laws. Till this period, laws were passed, and the lord lieutenants gave the royal assent from their own power and authority, in the same manner as the king did in England; but this power having been abused in the disputes between the rival houses of York and Lancaster, particularly by Richard duke of York, it was enacted by Poyning's law that no parliament should be held in Ireland, till the chief governor and council should previously certify to the king the causes and considerations for holding the same; or, in other words, all the acts which were intended to be passed in the ensuing session of parliament. This law appears to have been rigidly enforced in subsequent parliaments, till the 28th and 33d of Henry VIII., when two parliaments were held and confirmed, notwithstanding the prescriptions of Poyning's law had not been observed. In the latter years of this monarch's reign, and in the fourth of Philip and Mary, an act was passed explanatory of Poyning's law, by which the lord lieutenant and council were permitted to certify to the king, while the parliament was sitting, such provisions as they might deem expedient to be formed into laws during the session of parliament. In the beginning of the reign of Elizabeth, parliaments were repeatedly held, wherein the ecclesiastical jurisdiction of the crown was re-established, and all the acts restoring popery were repealed. Poyning's law was by some considered as the sacred palladium of the English government, and which it was almost sacrilegious to touch; and to propose its repeal was considered as a political profanation.

In early times the lord lieutenant gave the royal assent, as the king does in England, without any communication with him, or any particular license. In the reign of Henry VII. it was provided, that all the bills should be previously sent by the lord lieutenant and council to

England, which were intended to be passed in any parliament, as a reason for holding the same. The extreme inconvenience of this necessary preliminary caused two temporary suspensions of this law in the reign of Henry VIII.; and in that of Philip and Mary, propositions for laws or heads of bills, might be transmitted from the council during the sitting of parliament. Till 1782, the practice grounded on these two laws was, that the council sent over a money bill every new parliament, as a reason for its convention, and also such propositions as were made to them from the two houses, while the legislature was sitting, for acts of parliament. But in consequence of a law passed in the said year, no bill could afterwards be transmitted from the council before the meeting of parliament. Latterly, bills passed in Ireland as they do in England, and the lord lieutenant was empowered by commission to give the royal assent similar to the mode in England, when the king does not give it in person.

Propositions for laws, or heads of bills, originated indifferently in either house. After two readings and a committal, they were sent by the council to England, and were usually submitted by the English privy council to the attorney and solicitor-general: they were then returned to the council of Ireland, who sent them to the commons, if they originated there (if not, to the lords); and after three readings they were sent up to the house of lords, where they went through the same stages; and then the lord lieutenant gave the royal assent in the same form which is observed in the imperial parliament. In all these stages in England and Ireland, any bill was liable to be rejected, amended, or altered; but when they had passed the great seal of England, no alteration could be made by the Irish parliament.

Latterly, Irish parliaments were convoked by proclamation from the crown. Bills originated in either house, and went from one to the other, as they do in the imperial parliament; after which they were deposited in the lords' office, when the clerk of the crown took a copy of them on parchment, which was attested to be a true copy by the great seal of Ireland on the *left* side of the instrument. The Irish council then transmitted them to England; and if they were approved of by the king, the copy was returned to Ireland, with the great seal of England on the *right* side, with a commission to the lord lieutenant to give the royal assent. There are very few instances of the crown having refused Irish bills, or of their not being returned, since the year 1782; but, nevertheless, the royal prerogative in negating a bill in Ireland, was as clear a right as it is at this moment in England; and although the crown has seldom exercised this ungracious prerogative, it by no means follows that it either does not possess it, or that it has fallen into disuse.\*

\*. Lord Mountmorres' History of the Irish Parliament.

In the reign of queen Elizabeth, the Irish parliament was more nearly modelled on that of England than it had hitherto been; and the following account is left by Mr Hooker, of a parliament held by Sir Henry Sidney, her deputy: "On the first day of which parliament, the lord deputy, representing her majesty's person, was conducted and attended in a most honourable manner into Christ's church, and from thence into the parliament house, where he sat under the cloth of estate, being apparelled in princely robes of crimson velvet, doubled or lined with ermine. And then and there, the lord chancellor made a very eloquent oration, declaring what the law was; of what great effect and value; how the common society of men was thereby maintained, and each man in his degree conserved, as well the inferior as the superior, the subject as the prince; and how careful all good commonwealths in the elder ages had been in this respect, which, considering the time, state, and necessity of the commonwealth, did from time to time ordain and establish most wholesome laws, either of their own devices, or drawn from some other commonwealth; and by these means have prospered and continued. And likewise how the queen's most excellent majesty, as a most natural mother over her children, and as a most vigilant princess over her subjects, hath been always, and now at present is, very careful, studious, and diligent in this behalf, having caused this present parliament to be assembled, and by the counsel and advice of you her nobility, and you her knights and burgesses, such good laws, orders, and ordinances may be decreed, as may be to the honour of Almighty God, the preservation of her majesty, and of her imperial crown of this realm; for which they were not only to be most thankful, but also to do their duties in this behalf."

On the 2nd of July, 1800, the kingdom of Ireland was united to Great Britain by a formal act of the legislature, by which the kingdom of Ireland is now represented in the imperial parliament of Great Britain. By the articles of Union (for which see page 267), one hundred members were to represent the commons of Ireland in the parliament of the united kingdom; but as the reform bill has entirely altered the representation, we refer to p. 401, for the particulars. Four lords spiritual, or bishops, by rotation of sessions, and twenty-eight lords temporal, elected for life, sit and vote in the imperial house of peers, on the part of Ireland. That kingdom now forms an integral part of the British dominions; and all the acts of the imperial parliament include Ireland, unless otherwise expressed in the act.



## CORPORATIONS.

ALL personal rights die with the person; but there are rights, which for the benefit of society, require to be continued when the person in whom they were first invested has become a clod of the valley. Yet as the formal revival and recognition of these rights in a succession of persons, would always be inconvenient and sometimes impracticable, it has been found necessary to create *artificial* persons, who may perpetually maintain and enjoy the original rights by a sort of immortality; these artificial persons are what are called bodies politic, bodies corporate, or corporations, and are qualified to take, grant, &c. The advantages which are thus derived to the interests of religion, learning and commerce, have been found by experience to be very great. The introduction of corporations into Europe seems to have been effected by Lewis le Gros, who erected the French boroughs into corporations, with the view of relieving the people from the feudal slavery, and of affording them protection, by means of certain privileges and a separate jurisdiction. It appears from Doomsday-book, that the greatest boroughs in England at the time of the conquest, were little more than country villages, whose inhabitants were only a number of low dependant tradesmen, living without any incorporation or particular civil tie.

To show the advantages of these incorporations, let us consider the case of a college in any of the universities founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals of which it is composed might indeed read, pray, study, and perform scholastic exercises together, so long as they should agree to do so; but they could neither frame nor receive any laws or rules for their conduct; none at least which could have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities; for in the event of such privileges being attacked, which of all this unconnected assembly has the right or ability to defend them? And when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves? The case is the same also in respect of holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing or transmitting the property to any other persons for the same purposes, but by endless conveyances from one to another, as often as the parties are changed. But when they are consolidated, and united into a

corporation, they and their successors for ever are considered in law only as one person, who never dies : as one person, they have but one will, which is collected from the sense of the majority of the individuals : this individual may establish rules and orders for the regulation of the whole, which are a sort of municipal law for this little commonwealth ; or rules and statutes may be imposed on it at its creation, which then take the place of natural laws : the privileges and immunities, the estates and possessions of the corporation, when once they are vested in them, will remain for ever invested, without any new conveyance to new successions ; for all the individual members that have existed from the foundation to the present time, or shall hereafter exist, are but one person in law, a person who never dies. In the same manner as the Thames, the Clyde, or the Forth, are the same rivers still, although the parts which compose them have been changing every instant from their first creation, ages ago.

These political constitutions seem to have been originally invented by the Romans ; and Plutarch informs us that they were introduced by one of their early kings, Numa ; who, on his accession to the throne, finding that the city was torn to pieces by the two rival factions of the Sabines and Romans, conceived the politic idea of subdividing these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards held in much consideration by the civil law, in which they were called *universitates*, as forming one whole out of many individuals ; or *collegia*, from their being gathered together : they were also adopted by the canon law, for the maintenance of ecclesiastical discipline ; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation, particularly by the invention of corporations *sole*, that is, consisting of one person only, of which refinement the Roman lawyers had no notion whatever ; their maxim being, that three persons made a corporation ; though they held that if a corporation consisting originally of three persons should be reduced to one, it may still subsist as, and be called, a corporation.

The law of England recognises two sorts of corporations, viz. *aggregate* and *sole*.

A corporation *aggregate*, consists of many persons united together into one society, and is kept up by perpetual succession : of which kind are the mayor and commonalty of a city or borough, the head and fellows of a college, and the dean and chapter of a cathedral church.

A corporation *sole*, consists of a single person and his official successors in some particular station, who are incorporated by law in order to give them some legal advantages, particularly that of perpetuity, which in their natural persons they could not have. In this sense, the king is a corpo-

ration *sole* : so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar.

The wisdom of the law is manifest in making a parson or vicar a body corporate, because originally the freehold of the churchyard, parsonage house, or manse as it is called in Scotland, the glebe, and the tithes, were vested in the parish clergymen, as a temporal recompense for their spiritual services to the people, and with the intent that the same emoluments should for ever afterwards continue as a recompense to their successors. And had not the law prevented it by this fiction, the freehold would have descended to the heirs of the clergy instead of to their successors, and they would have been liable for their debts and incumbrances; or at best their heirs might have been compellable, at considerable trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained, that the parson or parish minister shall never die, any more than the king, by making both him and his successors a corporation; by which means all the original rights of the parsonage are preserved entire to his successor; for the present incumbent or minister, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

Bodies corporate are again divided into ecclesiastical and lay, which may be either *sole* or *aggregate*.

Ecclesiastical corporations, are when the members that compose them are entirely spiritual persons; such as bishops, certain deans and prebendaries; all archdeacons, parsons, and vicars; these are *sole* corporations. Deans and chapters at present, and in popish times, priors and convents, abbots and monks, and the like, are corporations *aggregate*. These corporations were instituted for promoting religion and perpetuating its benefits in the world.

Other lay corporations have been erected for the good government of a town or particular district, as a mayor or commonalty, bailiff, and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns; and some for the better carrying on of special purposes, as church wardens, for the conservation of the goods of the parish; the college of physicians, and company of surgeons, in London, for improving the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquaries, for the study of antiquities. The eleemosynary sort, are such as are constituted for the perpetual distribution of the free alms or bounty of their founder, to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both in and without the two universities of Oxford and Cambridge; which colleges are founded for two purposes: 1. For the

promotion of piety and learning by proper regulations and ordinances; 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are strictly speaking *lay*, and not ecclesiastical, even although they be composed of ecclesiastical persons, and although in some things they partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Having now pointed out the several species of corporations, we will consider, I. How corporations in general may be created. II. What are their powers. And, III. How they may be dissolved.

I. Corporations may be created either by common law, by prescription, or by act of parliament. But as the king's consent is absolutely necessary, any one of these methods may be reduced to this, of the king's letters patent or charter of corporation; for in all cases the king's consent is either implied or expressly given. The king's implied consent is to be found in corporations which exist by force of the common law, to which former kings are supposed to have given their consent; common law being nothing else than custom arising from the universal agreement of the whole community. Of this sort are, by a fiction of law, the king himself, all bishops, parsons, vicars, church wardens, and some others; who have ever been held in common law (as far as law books can show) to have been corporations *virtute officii*; and this corporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of those persons, but we must have an idea of a corporation, capable of transmitting his rights to his successors at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by prescription, such as the city of London, and many others, which have existed as corporations beyond the memory of man; and therefore are considered in law to be well created. For although the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes that there once was one, and that by variety of accidents, which the lapse of time may produce, the charter has been lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament or charter. Corporations may certainly be created by act of parliament, for to that the king's consent is absolutely necessary to make an act; but it is to be observed, that most of those statutes which are usually cited, as having created incorporations, either confirm such as have before been created by the king; as in the case of the college of physicians, created by charter in the tenth year of the reign of Henry VIII., which charter was afterwards confirmed by act of parliament; or they recognise the king's right to erect a corporation *in futuro*, with such and such powers, as in the case of the bank of England, and the

society of the British fishery, so that in fact the king is the creator by means of his royal prerogative. All other methods, therefore, by which corporations exist, by common law, by prescription, and by act of parliament, are for the most part reduceable to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words, *creamus, erigimus, fundamus, incorporamus*, or such like. Nay, it is even held, that if the king grants to a set of men to have a "mercantile meeting or assembly," it is alone sufficient to incorporate and establish them for ever. The king may grant the power of erecting corporations to a subject; that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is in reality the king who erects, and the subject is but his instrument; for though none but the king alone can make a corporation, yet he who acts by the instrumentality of another is himself the operator. In this manner, the chancellor of the university of Oxford has power by charter to erect corporations, and has actually often exerted it in the erection of several matriculated companies of tradesmen subservient to the students, which incorporations are at present subsisting, nevertheless it is still the king who in reality erects, only using the instrumentality of the chancellor.

II. When a corporation is erected, it is necessary that a name be given to it; and by that name alone it must sue and be sued, and do all legal acts. When a corporation is once formed and named, it acquires various powers, rights, capacities, or incapacities; some of which are incident to all corporations, such as the right of electing members to keep up perpetual succession, which is the very end and design of its incorporation; and therefore all aggregate corporations have a necessarily implied power in electing members in the place of those who die or are removed; the power of doing all such legal acts as natural persons may perform; to sue and be sued, implead or be impleaded, grant or receive by its corporate name, the same as an individual person; of purchasing lands and holding them for themselves and successors; of having a common seal, the affixing of which makes one joint assent of the whole community: for a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse, it otherwise acts and speaks only by its common seal; for though the particular members may express their private consents to any acts by words, or signing their names, yet these do not bind the corporation; it is the affixing of the common seal, and that only, which unites the several assents of the individuals composing the community, and makes a joint assent of the whole; and of making bye-laws for the better government of the society; which laws, however, must not be contrary to the laws of the land, otherwise they are void. But no trading company in Great Britain is allowed to make bye-laws, which in any wise affect the

king's prerogative, or the common profit of the people, under a penalty of forty pounds, unless they be approved of by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits; and even though they be so approved, still if contrary to law they are void. These powers are inseparably incident to all aggregate corporations; for although two of them may be practised by a corporation sole, yet they are very unnecessary, viz to have a corporate seal to testify his sole assent, and to make statutes for his own government. There are certain disabilities attached to aggregate corporations. They cannot commit treason or any other offence, in their corporate capacity, though they may as individual members.

Corporations have a capacity to purchase lands for themselves and successors; but they are excepted out of the statute of wills; so a devise of lands to a corporation is not good, except it be for charitable uses. And even their privilege of purchasing from any living grantor is much abridged by several statutes; so that before they can exert that capacity with which they are invested by the common law, a corporation, either lay or ecclesiastical, must have a license to purchase from the king.

The particular duty of a corporation, is to act up to the end or design, whatever it be, for which it was created. But as all corporate bodies, like individuals, are frail and liable to err, the law has provided proper persons to *visit*, inquire into, and correct all improprieties and abuses that may arise in any corporation, whether sole or aggregate, and to rectify their irregularities or misconduct. Formerly the pope, but now the king, is the *legal* visitor of the archbishops of Canterbury and York; the archbishop has the charge of all the bishops in his province; and the bishops superintend all deans and chapters, parsons, vicars, and all other spiritual corporations in their respective dioceses. The founders, their heirs or assigns, are the visitors of all *lay* corporations, whether civil or eleemosynary.

By the founder of a corporation, in the strict and original sense of the term, the law understands to be the king, who alone can incorporate a society; so that in civil corporations, there is no other founder than the king. But in the case of eleemosynary foundations, such as colleges and hospitals, where there is an endowment of land, the right of visitation devolves by law to the patron or endower, his heirs and assigns.

The king exercises his jurisdiction over civil corporations in his court of king's bench, where alone all misbehaviours of this kind of corporations are inquired into and redressed. It is not, however, customary in professional language, to call this authority of the king's bench, a visitatorial power. If the endower of an eleemosynary corporation appoint no one as a visitor, that office devolves on the bishop of the diocese.

III. How a corporation may be dissolved. Any particular member of

a corporation may be disfranchised, or be deprived of his place in it, by acting contrary to the laws of the society, or the laws of the land, or he may voluntarily resign his rights and privileges. But the body politic itself may also be dissolved in several ways, which dissolution is its civil death; and when it becomes defunct, their lands and tenements revert to the person or his heirs who originally granted them to the corporation, because the law annexes a condition to every such grant, that if the corporation shall be dissolved, the grantor shall have his lands again, on account of the failure of the cause of the grant. The grant continues indeed only during the existence of the corporation, which *may* endure for ever, but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of any other grant for life.

Corporations may be *dissolved* by act of parliament, which is boundless in its operations; by the natural death of *all* its members, in cases of aggregate corporations; by surrender of their franchises into the king's hands; and by forfeiture of their charters, through negligence or abuse of their privileges; in which case the law judges that the body politic has broken the conditions on which it was incorporated, and therefore the incorporation is void. In the abuse of its franchise, a writ *quo warranto* is granted to inquire by what warrant the members *now* exercise their corporate power, having forfeited it by such and such proceedings. When a corporation is dissolved, the endowment reverts to the heirs of the patron who endowed it. By such dissolution its debts, either to or by it, are totally extinguished, and its members are neither individually nor collectively accountable for them.

When king Charles II. enforced the law, by issuing the writ of *quo warranto* against the city of London, the other corporations throughout the kingdom surrendered their charters into the king's hands. He afterwards restored their charters under certain conditions. But after the Revolution, the statute 2 W. and M. reversed the judgment against the city of London, and enacted, that its franchisees shall never more be forfeited for any cause whatever.\* And because, by the common law, corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter, or by the custom established by prescription, it is now provided that in future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one made upon the charter or prescriptive day.

On the 13th April, 1829, a bill passed both houses, after violent

\* Custance on the Constitution.

debates, and received the king's consent, for admitting Roman Catholics into all the lay corporations in the kingdom, but reserved from the right of interference with the *ecclesiastical* incorporations.\*

The parliament which met at London, 8th May, 1661, enacted for the protection of the corporations, from the Roman Catholics and nonconformists becoming predominant in them, a law generally known as the corporation act. It is entitled "an act for the well governing and regulating corporations," and enacts,—

"that within the several cities, corporations, boroughs, cinque ports, and other port towns within the kingdom of England, dominion of Wales, and town of Berwick on Tweed, all mayors, aldermen, recorders, bailiffs, town clerks, common council men, and other persons bearing any office or offices of magistracy, or places of trust, or other employment, relating to or concerning the government of the said respective cities, corporations, and boroughs and cinque ports, and their members, and other port towns, shall take the oaths of allegiance and supremacy, and this oath following :

"I, A. B. do declare and believe, that it is not lawful upon any pretence whatsoever, to take arms against the king ; and that I do abhor that traitorous position of taking arms by his authority against his person, or against those that are commissioned by him.

"They shall also subscribe the following declaration :

"I, A. B. do declare that there lies no obligation upon me from the solemn league and covenant; and that the same was an unlawful oath imposed on the subject against the laws and liberties of the kingdom.

"Provided also, and be it enacted by the authority aforesaid, that no person shall be hereafter elected or chosen into any of the offices or places aforesaid, that shall not have within one year next before such election or choice taken the sacrament of the lord's supper according to the rites of the church of England ; and that every person so elected shall take the aforesaid oaths, and subscribe the said declaration, at the same time when the oath for the due execution of the said places and offices shall be respectively administered."

This act excluded the dissenters in England from filling public offices either under the government or in boroughs, unless they had, within the compass of a year, taken the sacrament according to the rites of the church of England. Of this the dissenters loudly complained. But they always complied with the act; and communicated at their parish churches previous to entering into office. This they continued to do for many years, but in consequence of the dislike which conscientious men would naturally feel at communicating with a church from which they had dissented because they had conceived that it was not a true church, the act was so often evaded altogether, that, in the liberal opinions of the age, an act of indemnity was annually passed to save those from the penalties of the act who had either neglected or refused to communicate at the parish church. So that in effect this act lay almost a dead letter, and no one had of late years been in any way incommoded by it. Many attempts, however, were made to procure its repeal, at different times, especially in 1787, when it was warmly agitated in the house of commons, and pamphlets and other

\* 10 Geo. IV., c. vii., sec. 14, 15 ; for Relief of his Majesty's Roman Catholic Subjects : 13th April, 1829. See p. 328.



publications issued in abundance from the press on both sides of the question. In this debate Lord North contended that the test acts were and ought to be carried into execution, though he observed, "there were instances in which persons had introduced themselves into corporations without taking the test, because they relied on the annual indemnity act, which saved them." This sort of *mental fraud*," continued his lordship, "did not recommend these persons to the indulgence of the legislature: it was an evasion and an abuse of an act of parliament, which solemnly and substantially required that the test should be given fairly and truly."

The first or corporation act, 13 Car. II., was passed, as we have said, in 1661, and its design was merely to prevent the adherents of Cromwell's government from getting possession of the corporations in the boroughs, and thereby to endanger the monarchy by their plotting to restore the republican commonwealth which had just then been subverted. Commissioners were appointed under the act to administer the oaths which it prescribes. The act of uniformity had not been at that time passed, and the dissenters made then little or no scruple of communicating either with each other or with the established church. It had been the custom among the earliest puritans to "communicate with the church in word and sacraments," during the first part of the grand rebellion, when the presbyterians gained an ephemeral establishment in England. The independents did not object to communicate occasionally with the presbyterians, and to receive their members to communicate in return; and it is very remarkable, that out of fifty-six presbyterian members in the house of commons when the bill was passed, only two of them made objections to receiving the sacrament according to the rites of the established church, when it was administered "to see whether they were all protestants." And even the Roman catholics communicated with the protestant episcopal church of England, in the earlier part of queen Elizabeth's reign, till they were commanded to abstain by a bull of pope Clement VIII.

The second of the statutes affecting protestant dissenters is the *test act*, by which they were excluded from places of civil and military trust and offices. This act was passed in 1672, and was the 25th of Charles II.; it was entitled "An act for preventing danger which may happen from popish recusants." It provided that any person admitted into office, or receiving pay from his majesty, or holding any command or place of trust under him, or in his household, shall, within three months (but three was afterwards extended to six months) receive the sacrament according to the usage of the church of England, and produce a certificate thereof, under the penalty of incapacity for the office, and avoidance of the appointment; and (in case of acting without compliance) of being subject on conviction, to disability for serving in any court of justice, from acting as a guardian,

executor, or administrator, or receiving a legacy or gift, or bearing any office in England or Wales; and also to the payment of a fine of £500, the whole of which went to the informer.

It is obvious that this act was intended to operate against the Roman catholics, and had no reference to the protestant nonconformists; neither did it exclude them from seats in parliament. The statute, 30 Charles II., which was passed five years afterwards, in some degree furnishes a clue to the feeling which dictated the test act. It recites that the previous act "had not the desired effect, by reason of the free access which *popish* recusants have had to his majesty," and extends the exclusion to members of parliament, but in such a way as not to include the protestant dissenters in its operation. It entirely omitted the sacramental test, and prescribed a declaration against popery, to be signed as the qualification for filling a seat in parliament, and also for acting as a sworn servant of his majesty, which last provision was afterwards repealed, so that the act operated only to the exclusion of the Romanists from parliament. It may be farther added, that a bill for the express exemption of the protestant dissenters from the operation of the test laws, whom the act of uniformity, 14 of Charles II., had thrown into a separate body, passed the commons and was entertained by the peers in the same session in which the test act was passed; and a motion for incapacitating them to sit as members of parliament, was lost by a considerable majority. The house of commons have repeatedly in strong terms disavowed the application of these laws to them, as "grievous to the subject," and "dangerous to the peace of the kingdom." Occasional conformity for the sake of place and power, continued to be very usual, and a comprehension of all sects and parties under the wings of the church, was even contemplated by the nonconformists at one time. The question of the lawfulness or duty of such a conformity was much canvassed, and many arguments were advanced to avoid the sin of schism in all matters not deemed to be essential. At a meeting of the nonconformist ministers in 1666, after the act of uniformity was passed, it was agreed that communion with the established church of England, *was in itself lawful and good*; and the practice of occasional conformity was so frequent, that in 1711, the spirit of the laws of Charles II. was enforced by an act requiring not merely the taking of the sacrament, but perfect and entire conformity to the establishment. This act was however repealed in 1718, and the practice was in effect regulated by a provision against any officers of corporations taking their insignia of office to nonconformist places of worship.

The corporation act, the test act, and the act of uniformity, were all passed for the protection and legal fences of the church of England, and were rendered necessary by the apprehensions on the score of popery,

which was at that time meeting with great encouragement at court; and also from the specimen of the *moderation* of the assembly of divines who met at Westminster, and who at first pretended only to moderate the episcopacy a little, to reform the liturgy, and give ease to tender consciences, but who ended their work by tearing the church of England up by the roots, banishing her prelates, and prohibiting the use of the liturgy entirely, under very heavy penalties: therefore these acts were passed soon after the Restoration as her *legal fences*. During the administration of the duke of Wellington, these *legal fences* were removed by an act\* which passed both houses of parliament, and received the royal assent on the 9th May, 1828. This act repealed the test and corporation acts. After which it was not necessary for dissenters to receive the sacrament according to the rites of the church of England. They became eligible also to enter the corporations. This act will be found at page 308. It was a preparatory measure to enable the administration to repeal all the acts which affected the Roman catholics, and which took place the following year, on the 13th April, 1829.†

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### MILITARY AND MARITIME STATES.

THE military state includes the whole of the soldiery; or such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.

Almost every page of history is polluted with blood. "Whence come wars and fightings? Come they not hence, even of your lusts, that war in your members?" Pride, lust, and envy, have in all ages conspired against the peace of society, and disturbed the repose of mankind. These vicious passions have at all times been the cause of that "distress of nations," which is the necessary consequence of all wars and tumults. Self-preservation, however, being the first law of nature, those peaceable nations which are exposed to the rapacity of neighbouring powers of a more warlike or turbulent character, have found it necessary for their own safety to assume a warlike position.

It is extremely dangerous, in a land of liberty, to make the profession of arms a distinct order, because in free states, the profession of a soldier, taken singly and merely as such, is justly an object of jealousy. The laws and constitution of these kingdoms know no such state as that of a perpetual standing soldiery, bred up to no other profession than that of war.

\* 9 Geo. IV., c. 17.

† 10 Geo. IV., c. 7.—Statutes at Large—Blackstone's Commentaries, with Professor Christian's Notes—Custance on the Constitution

It was not till the reign of Henry VII. that the kings of England had even so much as a guard about their persons; and it was not till after the Revolution in 1688, that a perpetual standing army was kept up, rendered necessary by the wars into which that event plunged England.

At his coronation, Henry VII. instituted, partly from pomp, but chiefly from personal vanity, a band of fifty archers, who were termed yeomen of the guard. Henry was quite conscious that his title was questionable. Aware that an appearance so novel, and to which Englishmen were so unaccustomed, might naturally impress his subjects with the idea that he entertained a jealousy of their loyalty, and lest they might imagine that this force was raised to intimidate them, he declared the institution to be perpetual; and accordingly they form a part of the "pomp and circumstance" of the court of St James to this day, and are still habited in the original uniform of the days of Henry VII. Our Scottish monarchs were not long in copying this piece of royal state and parade, and accordingly a body of yeomen were soon after embodied at Holyroodhouse by James V.

It seems universally agreed by all historians, that king Alfred first settled a national militia in England, and made all the subjects of his dominions soldiers, by a prudent discipline: but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation. Under the Saxon monarchs of England, as appears from the laws of Edward the Confessor, the military array of England was under the command of dukes, that is leaders, or heretochs, who were constituted through every province and county in the kingdom; being elected from the principal nobility, and such as were remarkable for their wisdom, fidelity, and courage. Their power was almost unlimited, and their duties were, to lead and regulate the armies of England. On account of this great power and important trust, these leaders were generally elected by the Wittenagemot, or great council of the nation, agreeable to the ancient Saxon constitution, which was extremely jealous of intrusting power to those who might abuse it for the oppression of the people. This custom was common too among the Germans, from whom our Saxon ancestors sprang, who had their military leaders, as well as kings; the former possessing an independent power over the military, as the kings exercised an absolute authority over the civil state. The leaders, or dukes, were elective, the kings hereditary. In the succession of their kings the right of primogeniture was adhered to, but in choosing the commanders of armies, courage, experience, and warlike merits, were the criterions. This unlimited power conferred on the military leaders, though intended for the benefit of the people, was highly detrimental to the prerogatives of the crown, which we have already shown, is more beneficial to the subjects when strong, than when in any way diminished by the encroach-

ment of the people or any inferior power. In the reign of Edmund Ironside, Edric, duke or heretoch of Mercia, by the unlimited nature of his command in the king's army, and by his own repeated treacheries, at last enabled Canute the Dane to usurp the crown of England.

Upon the Norman Conquest, the feudal law was introduced here in all its rigour, the whole of which is built on a military plan. All the lands in the kingdom were divided into what were called knights' fees, consisting of sixty thousand. A knight or soldier, *miles*, was bound to attend the king in his wars for forty days in a year, in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious; by which sagacious plan, William the Conqueror had an army of sixty thousand men, without any expense, constantly ready at his command, and he commanded, under very severe penalties for neglect, the personal service of all knights and others. This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the Restoration by the statute 12 Char. II. But although in the feudal times there was not a standing army for the suppression of internal insurrection, or the defence of the kingdom against external invaders, yet we are not to imagine that the kingdom was left wholly without defence. Besides those who by their military tenures were bound to perform forty days' service in the field, there were first the assize of arms, enacted by Henry II., and afterwards the statute of Winchester under Edward I., which obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace; and constables were appointed in every hundred, by the Winchester statute, to see that such arms were provided. These weapons were changed in conformity with the change introduced by the use of gunpowder, by the statute of Philip and Mary, and other arms of more modern invention substituted; but both these were again repealed by James I. During the continuance of the two former statutes, it was usual for the sovereigns to issue commissions of array, and to send into every county, officers in whom they could repose confidence, to muster and set the inhabitants of every district into military array. The form of this commission of array was settled in parliament in the reign of Henry IV., when at the same time it was provided, that no man should be compelled to go out of the kingdom at any rate, nor even out of his county, but in cases of urgent necessity; nor should provide substitutes, but by consent of parliament. Every man was obliged, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace. About the reign of Henry VIII. and his children, lord lieutenants began to be introduced as standing

representatives of the crown to keep the counties in military order. In the reign of bloody Mary, they are spoken of as known and regular officers, though they could not have been many years in use; and Camden mentions them in the reign of Elizabeth as *extraordinary* magistrates, that were constituted only in times of difficulty and danger.

Military affairs continued in this state till the repeal of the statutes of armour by James I. Afterwards, when king Charles I. was under the necessity of raising armies for the suppression of the rebellion in Scotland, he issued commissions of lieutenancy, and exercised those military powers which, from immemorial usage, as well as natural right, had been the prerogative of the crown. But the long parliament, stepping beyond the line of their duty and allegiance, disputed this undoubted prerogative, alleging that it merely rested on immemorial usage. Great heats and animosities were displayed in debating this unconstitutional question. The decision of this against the king, became at last the immediate cause of the fatal rupture between that patriotic prince and his rebel parliament; for the two houses not only denied the prerogative of the crown, but illegally seized into their own hands the whole power and command of the militia. But after the happy Restoration, when the nation was delivered from the cruel military bondage of Oliver Cromwell, the parliament recognized the sole right of the king to govern and command the military state, by the following statute: "Forasmuch as within all his majesty's realms and dominions, the *sole supreme* government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of his majesty and his royal predecessors, kings and queens of England, and that both or either of the houses of parliament cannot nor ought to pretend to the same; nor can, nor lawfully may raise or levy any war, offensive or defensive, against his majesty, his heirs or lawful successors; and yet the contrary thereof hath of late years been practised, almost to the ruin and destruction of this kingdom; and, during the late usurped government, many evil and rebellious principles have been instilled into the minds of the people of this kingdom, which, unless prevented, may break forth to the disturbance of the peace and quiet thereof."\*

Soon after the restoration of Charles II., when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination; and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted; the general

\* 13 Ch. II. c. 6.

scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years, and officered by the lord lieutenant, the deputy-lieutenant, and other principal landholders, under a commission from the crown. They cannot be compelled to march out of their counties, unless in cases of invasion or actual rebellion, nor in any case to march out of the kingdom. They are to be exercised at stated times, and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject, like regular troops, to the rigours of martial law, which is absolutely necessary for the preservation of discipline. This is the constitutional security which the British laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes declare are essentially necessary for the safety and prosperity of the kingdom.

But when the nation was engaged in war, more veteran and better disciplined troops were esteemed necessary, than could be expected from a mere militia; and therefore at such times more vigorous methods were adopted for the raising of armies and the due regulation and discipline of the soldiery, which are merely to be viewed as temporary excrescences arising out of the violence of men's passions, rather than as a permanent and perpetual law of the kingdom; because martial law is built upon no settled principles, but is entirely arbitrary in its decisions, and is, as Sir Matthew Hale observes, in truth and reality no law, but something permitted rather than enacted as law. Order and discipline in the army is of absolute necessity. Martial law, therefore, ought not to be permitted in time of peace, when the king's courts are open for every one to receive justice according to the known laws of the land. And it is upon record, that Thomas, earl of Lancaster, being convicted by martial law at Pontefract, in the fifteenth year of the reign of Edward II., his attainder was reversed by Edward III., and his corruption of blood restored, on account of the illegality of martial law in the time of peace. And the law establishes that if a lieutenant or other officer that hath a commission of martial authority, doth in time of peace hang, or otherwise execute any man, by colour of martial law, it is *murder*, for it is against *magna charta*. And the petition of right enacts, that no soldiers shall be quartered on the subject without his own consent; and that no commission shall issue to proceed within this land according to martial law. And although after the Restoration king Charles II. maintained five thousand regular troops for guards and garrisons, which the disturbed state of Scotland required; and king James II. by degrees increased this army to thirty thousand, and all paid out of his own civil list; yet it was made one of the articles of the bill of rights, that the raising or keeping a standing army within

the kingdom in time of peace, unless with consent of parliament, is against law.

It has also for many years past been annually judged necessary for the safety of the kingdom, the defence of the possessions of the crown, and the preservation of the balance of power in Europe, to maintain a standing body of troops even in time of peace, under the command and at the entire disposal of the crown; but who are *ipso facto* disbanded at the expiration of every year, unless continued by parliament. "This plan of keeping a standing army in time of peace was first introduced by Charles VII. of France about the year 1445, and has since become absolutely necessary, from the military attitude of other powers. "To prevent," says Montesquieu, "the executive power from being able to oppress, it is requisite that armies with which it is intrusted should consist of the people, and have the same spirit with the people, as was the case at Rome, till Marius new-modelled the legions, by enlisting the Italian rabble, and laid the foundation of all the military tyranny that ensued." According to these principles, then, nothing ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept afoot, a body too distinct from the people. It should therefore, like our own, be a body entirely composed of natural born subjects; and to be enlisted for a limited time.

To keep this body of troops in order, an annual act of parliament likewise passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom, and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or knowing of it, shall not give notice to the commanding officer; or shall desert, or list into any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself. Although the strictest discipline and most exact regulations be not only expedient, but absolutely necessary, during the time of actual war, yet in times of profound peace the severity of military discipline may, in some measure, be relaxed without much public inconvenience. Upon this principle desertion in time of war is made felony without benefit of clergy, and the offence is tryable by a jury, and before the judges of the common law; yet by the militia laws a much lighter punishment is inflicted for desertion during peace. If in a court martial the charge of desertion is proved, the court must pass the sentence of death; they



have no alternative. But to avoid this, and to give the deserter the lighter punishment, the offence is called "being absent without leave," which is a milder way of expressing this most shameful crime, and which, if proved, subjects the deserter to an arbitrary punishment at the discretion of the court. By the ancient Roman law, desertion in time of war was punished with death, but more mildly in tranquil times. But our mutiny act makes no such distinction; for any of the faults above mentioned are equally at all times punishable with death itself, if a court martial shall think proper. This discretionary power of a court martial is guided by the directions of the crown, which, with regard to military offences, has almost an absolute legislative power. "His majesty (says the act) may form articles of war and constitute courts-martial, with power to try any crime by such articles, and inflict such penalties as the articles direct."

One of the greatest advantages of our law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious. Nothing is left to arbitrary discretion. By his judges the king dispenses what he himself, with the advice of parliament, has previously ordained. How much, therefore, is it to be regretted, that a body of men, whose courage and bravery have so frequently preserved the liberties of their country, should be reduced by their military discipline to a state of servitude in the midst of a nation of freemen; for Sir Edward Coke says, that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious. Neither is this state of servitude altogether consistent with the maxims of the sound policy observed by other free nations. For the greater the general liberty is, that any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Montesquieu observes, seeing the liberty which others possess, and from which they themselves are excluded, are apt to live in a state of perpetual envy and hatred towards the rest of the community, and to indulge a malignant pleasure in contributing to destroy those privileges which they cannot themselves enjoy.

This annual act places soldiers in a worse condition than that of any other subjects; but the humanity of our legislature has, in some cases, put them in a much better. By 43 Elizabeth, a weekly allowance is to be raised in every county for the relief of sick, hurt, and maimed soldiers, and the royal hospital at Chelsea is established for such as are worn out in the service. By several statutes, which have been enacted, officers and soldiers are at liberty to use any trade or occupation they are fit for, in any town in the kingdom, (except the two universities,) notwithstanding any statutes, custom, or charter to the contrary. And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other

personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases. Our law does not indeed extend this privilege so far as the civil law, which carried it to an extreme bordering upon the ridiculous; for if a soldier in the article of death, wrote anything in bloody letters on his shield, or scratched with his sword, in the dust or sand, it was held valid as a good military testament.

The maritime state is nearly allied to the former, though much more agreeable to the principles of our free constitution. The royal navy of England has ever been its best defence and ornament; its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger to liberty can be apprehended, and accordingly it has ever been assiduously cultivated, even from the earliest ages. "According to the Welsh Triads," says Southey, "the earliest name by which Britain was known was *Clas Merddiu*, the sea-defended spot: such an appellation may seem to have been prophetic. But the sea defends no people who cannot defend themselves: and it was with this feeling, that Wordsworth, the great poet of his age, poured forth a lofty strain, when looking from a valley near Dover, towards the coast of France, and the span of waters which separated us from our then most formidable neighbour, Napoleon Buonaparte: he said,

' Even so does God protect us, if we be  
Virtuous and wise! Winds blow, and waters roll,  
Strength to the brave, and power, and Deity;  
Yet in themselves are nothing! One decree  
Spoke laws to *them*, and said, that by the soul  
Only, the nations shall be great and free.'

With all the ports of the continent in his possession, and all its navies at his command, that narrow channel, that 'span of waters,' was found impassable by the most ambitious, the most powerful, the most enterprising, and the most inveterate enemy with whom this nation was ever engaged in war." Great Britain had manfully won and victoriously maintained the dominion of the sea, and to so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, called the laws of Oleron, as compiled by Richard I. at that island on his way to Palestine, have been received by all the nations of Europe as the ground of all their marine constitutions.

Many laws have been made for the supply of the royal navy with seamen, for their regulation when on board, and to confer privileges and rewards on them during and after their service;\* some of which are as follow:—

1. Officers are to cause public worship, according to the liturgy of the church of England, to be solemnly performed in their ships, and to take care that prayers and preaching, by the chaplains, be performed diligently, and that the Lord's day be observed. 2. Persons guilty

\*. 13 Car. II., c. 9. 22 Geo. II., c. 22. 19 Geo. III., c. 17.

of profane oaths, cursing, drunkenness, uncleanness, &c., to be punished as a court martial thinks fit. 3. If any person shall *give or hold intelligence to* or with the enemy *without leave*, he shall suffer death. 4. If any letter or message from an enemy be conveyed to any in the fleet, and he shall not in twelve hours acquaint his superior officer with it, or if the superior officer, being acquainted therewith, shall not reveal it to the commander-in-chief, the offender shall suffer death, or such punishment as a court martial shall impose. 5. Spies and persons endeavouring to corrupt any one in the fleet, shall suffer death, or such punishment as a court-martial shall impose. 6. No person shall relieve an enemy with money, victuals, or ammunition, on like penalty. 7. All papers taken on board a prize shall be sent to the court of admiralty, &c., on penalty of forfeiting the share of the prize, and such punishment as a court martial shall impose. 8. No person shall take out of any prize any money or goods, unless for better securing the same, or for the necessary use of any of his majesty's ships, before the prize shall be condemned, upon penalty of forfeiting his share, and such punishment as shall be imposed by a court martial. 9. No person on board a prize shall be stripped of his clothes, pillaged, beaten, or ill-treated, on pain of such punishment as a court martial shall impose. 10. Every commander, who, upon signal or order for fight, or sight of any ship which it may be his duty to engage, or who, upon likelihood of engagement, shall not make necessary preparations for fight, and encourage the inferior officers and men to fight, shall suffer death, or such punishment as a court martial shall deem him to deserve. And if any person shall *treacherously or cowardly* yield or cry for quarter, he shall suffer death. 11. Every person who shall not obey the orders of his superior officer in time of action, to the best of his power, shall suffer death, or such punishment as a court martial shall deem him to deserve. 12. Every person who, in time of action, shall withdraw or keep back, or not come into the fight, or do his utmost to take or destroy any ship which it shall be his duty to engage, and to assist every ship of his majesty or his allies, which it shall be his duty to assist, shall suffer death. 13. Every person who through cowardice, &c., shall forbear to pursue the chase of an enemy, or shall not assist or relieve a known friend in view to the utmost of his power, shall suffer death. 14. If any person shall delay or discourage any action or service commanded, upon pretence of arrears of wages, or otherwise, he shall suffer death, or such punishment as a court martial shall deem him to deserve. 15. Every person who shall desert to the enemy, or run away with any ship, ordnance, &c., to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death. 16. Every person who shall desert, or entice others to do so, shall suffer death, or such punishment as a court martial shall think fit. If any commanding officer shall receive a deserter, after discovering him to be such, and shall not with speed give notice to the captain of the ship to which he belongs; or if the ship is at a considerable distance, to the secretary of the admiralty or commander-in-chief, he shall be cashiered. 17. Officers or seamen of ships appointed for convoy of merchant ships, or of any other, shall diligently attend upon that charge according to their instructions; and whosoever shall not faithfully perform their duty, and defend the ships in their convoy, or refuse to fight in their defence, or run away cowardly, and submit the ships in their convoy to hazard, or exact any reward for conveying any ship, or misuse the master or mariners, shall make reparation of damages as the court of admiralty shall adjudge, and be punished criminally by death, or other punishment, as shall be adjudged by a court martial. 18. If any officer shall receive or permit to be received on board, any goods or merchandise, other than for the sole use of the ship, except gold, silver, or jewels, and except goods belonging to any ship which may be shipwrecked, or in danger thereof, in order to the preserving them for the owners, and except goods ordered to be received by the lord high admiral, &c., he shall be cashiered and rendered incapable of farther service. 19. Any person making, or endeavouring to make any mutinous assembly, shall suffer death. Any person uttering words of sedition or mutiny, shall suffer death, or such punishment as a court martial shall deem him to deserve. If any officer, mariner, or soldier, in or belonging to the fleet, shall behave himself with contempt to his superior officer, *being in the execution of his office*, he shall be punished according to the nature of his offence by the judgment of a court martial. 20. Any person concealing any traitorous or mutinous practice or design, shall suffer death, or such punishment as a court

martial shall think fit. Any person concealing any traitorous or mutinous words, or any words, practice, or design, tending to the hinderance of the service, and not forthwith revealing the same to the commanding officer, or being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, shall be punished as a court martial thinks he deserves. 21. Any person finding cause of complaint of the unwholesomeness of victuals, or upon other just ground, shall *quietly* make the same known to his superior, who as far as he is able, shall cause the same to be presently remedied; and no person upon any such or other pretence shall attempt to stir up any disturbance, upon pain of such punishment as a court martial shall think fit to inflict. 22. Any person striking any his superior officer, or drawing or offering to draw or lift up any weapon against him, *being in the execution of his office*, shall suffer death. And any person presuming to quarrel with any his superior officer, *being in the execution of his office*, or disobeying any lawful command of any his superior officer, shall suffer death, or such other punishment as shall be inflicted upon him by a court martial. 23. Any person quarrelling or fighting with any other person in the fleet, or using reproachful or provoking speeches or gestures, shall suffer such punishment as a court martial shall impose. 24. There shall be no wasteful expense, or embezzlement of any powder, shot, &c., upon penalty of such punishment as by a court martial shall be found just. 25. Every person burning or setting fire to any magazine or store of powder, ship, &c., or furniture thereunto belonging, not then appertaining to an enemy, shall suffer death. 26. Care is to be taken, that through wilfulness or negligence no ship be stranded, run upon rocks or sands, or split or hazarded, upon pain of death, or such punishment as a court martial shall deem the offence to deserve. 27. No person shall sleep upon his watch, or negligently perform his duty, or forsake his station, *upon pain of death*, or such punishment, &c. 28. Murder; 29. Buggery or sodomy; 30. And robbery, shall be punished with death, or otherwise, &c. 31. Every person *knowingly* making or signing, or commanding, counselling, or procuring the making or signing any false muster, shall be cashiered, and rendered incapable of farther employment. 32. Provost marshal refusing to apprehend or receive any criminal, or suffering him to escape, shall suffer such punishment as a court martial shall deem him to deserve. And all others shall do their endeavours to detect and apprehend all offenders, upon pain of being punished by a court martial. 33. If any flag officer, captain, commander, or lieutenant, shall behave in a scandalous, infamous, cruel, oppressive, or fraudulent manner, *unbecoming his character*, he shall be dismissed. 34. Every person in actual service and full pay, guilty of mutiny, desertion, or disobedience, in any part of his majesty's service on shore when on actual service, relative to the fleet, shall be liable to be tried by a court martial, and suffer the like punishment as if the offence had been committed at sea. 35. Every person in active service and full pay, committing upon shore, in any place out of his majesty's dominions, any crime punishable by these articles, shall be liable to be tried and punished, as if the crime had been committed at sea. 36. All other crimes not capital, not mentioned in this act, shall be punished according to the laws and customs used at sea. No person to be imprisoned longer than two years. Court martial not to try any offence (except the 5th, 34th, and 35th articles) not committed upon the main sea, or in any great rivers beneath the bridges, or in any haven, &c., within the jurisdiction of the admiralty, or by persons in actual service and full pay, except such persons and offences, as in the 5th article, nor to try a land officer or soldier on board a transport ship. The lord high admiral, &c. may grant commissions to any officer commanding in chief in any fleet, &c., to call courts martial, consisting of commanders and captains. And if the commander-in-chief shall die or be removed, the officer next in command may call courts martial. No commander-in-chief of a fleet, &c., of more than five ships, shall preside at any court martial in foreign parts, but the officer next in command shall preside. If a commander-in-chief shall detach any part of his fleet, &c., he may empower the chief commander of the detachment to hold courts martial during the separate service. If five or more ships shall meet in foreign parts, the senior officer may hold courts martial and preside thereat. When it is improper for the officer next to the commander-in-chief to hold or preside at a court martial, the third officer in command may be empowered to preside, &c. No court martial shall consist of more than *thirteen*, or less than *five* persons. When there shall not be less than three, and yet not so many as five, of

the degree of a post captain or superior rank, the officer who is to preside may call to his assistance as many commanders under the degree of a post captain, as, together with the post captains shall make up the number five, to hold the court martial. After trial begun, no member of a court martial shall go on shore, until sentence, except in case of sickness, upon pain of being cashiered. Proceedings shall not be delayed, if a sufficient number remain to compose the court, which shall sit from day to day (except Sundays) till sentence be given. The judge, advocate, and all officers constituting a court martial, *shall be upon oath*. Persons refusing to give evidence shall be imprisoned. Sentence of death within the narrow seas (except in case of mutiny) shall not be put in execution till a report be made to the lord high admiral, &c. Sentence of death beyond the narrow seas shall not be put in execution but by order of the commander-in-chief of the fleet, &c. Sentence of death in any squadron detached from the fleet, shall not be put in execution (except in case of mutiny) but by order of the commander of the fleet, or lord high admiral, &c. And sentence of death passed in a court martial held by the senior officers of five or more ships met in foreign parts (except in case of mutiny) shall not be put in execution but by order of the lord high admiral, &c.

The royal navy of Great Britain is now in a very flourishing condition, having been diligently maintained in preceding reigns as the natural strength of the kingdom. Anciently there were three or four admirals appointed for the British seas, all of whom held their office during the king's pleasure, and each of them having particular limits under his government; as the admirals of the fleet commanded all the ships from the mouth of the Thames northward, southward, and westward. Besides these, there were admirals of the Cinque Ports: sometimes one admiral has commanded to the north, south, and west, at once; but the title of admiral of England was not customary till the reign of Henry IV., when the king's brother had that title bestowed on him. In former times, before the word *admiral* was introduced, the supreme naval officer was called *custos maris*, or the king's lieutenant-general of the sea.

Of the rank of admiral there are three degrees: viz. admiral, vice-admiral, and rear-admiral. Each of these degrees, consists of three divisions, each having a different coloured flag; hence all admirals assume the common title of flag officer, and take rank and command in the following order: admirals of the red, of the white, and of the blue squadrons, and each bears their respective flags at the main top gallant mast head; vice-admirals of each of the flags, bearing their respective flags at the fore top gallant mast head; and the rear-admirals, bearing their respective flags at the mizen top gallant mast head.

The admiral of the fleet is a mere honorary distinction, which gives no command. It is sometimes conferred, but not always, on the senior admiral on the list of naval officers. If he should happen to serve afloat, he is entitled to bear the union flag at the main top gallant mast head, which the present king, who was at that time duke of Clarence and admiral of the fleet, did, when he escorted Louis XVIII. across the channel in 1814, to take possession of the throne of France.

The lord high admiral of England is an ancient officer of high rank in the state, in whom not only the government of the navy is vested, but who, long before any regular navy existed in England, presided over a sovereign court, with authority to hear and determine all causes relating to the sea, and to take cognizance of all offences committed thereon. The origin of this dignitary is uncertain: it is generally supposed that the title and office were first instituted by Edward I., about the year 1296, but it would seem that it was merely honorary. From the 34th year of Edward II., however, there is a regular succession of admirals held by many illustrious names in English chivalry. In 1632, the office of high admiral was for the first time put in commission, all the great officers of state being the commissioners. During the usurpation of Cromwell, a committee of parliament acted as commissioners. At the Restoration, in 1660, his royal highness James duke of York, was appointed lord high admiral of England. In 1684, however, Charles II. deprived the duke of York of this command, and managed the affairs of the admiralty by his great officers of state until his death. King James II. upon his accession declared himself *lord high admiral* and *lord general*; and he conducted the affairs of the admiralty during his whole reign with the assistance of Mr Secretary Pepys. At the Revolution, William and Mary put the admiralty again in commission. In 1707, queen Anne appointed her own husband, prince George of Denmark, *high admiral of Great Britain*, in consequence of the union of the two crowns, with a council to assist him; and at his death the queen took the office into her own hands, Mr Burchett doing the duties as her deputy. Since that time, the office of lord admiral has been executed by lords commissioners of the admiralty, till May, 1827, when George IV. appointed his then royal highness the duke of Clarence lord high admiral, with a council of four officers to assist him. In which office he acted to the great satisfaction of the navy at large, until he solicited his late majesty to be permitted to resign his high office in 1828, when it was again put in commission.

The *droits* of admiralty consist of flotsome, jetsome, lagon, treasure, deodands, derelicts, found within the jurisdiction of the high admiral; all goods picked up at sea; all fines, forfeitures, ransoms, recognizances, and pecuniary punishments; all sturgeons, whales, porpoisses, dolphins, rigs, and grampusses, and all such large fishes; all ships and goods of the enemy coming into creek, road, or port, by stress of weather, mistake, or ignorance of the war; all ships seized at sea, salvage, &c.; together with his shares of prizes, which shares were afterwards called *tenths*. All prizes are now wholly given up by the crown to the captors, and such share of the *droits* as from circumstances may be thought proper. The lord high admiral also claimed, and enjoyed as his due, the cast ships;

and the subordinate officers of the navy, as their perquisites, all other decayed and unserviceable stores.

Though by the act of William and Mary, the lords commissioners are vested with all and singular authorities, jurisdictions and powers, which have been and are vested, settled, and placed, in the lord high admiral of England for the time being, to all intents and purposes, as if the said commissioners were lord high admiral of England; yet there is this remarkable difference in the two patents by which they are constituted, that the patent of the lord high admiral mentions very little of the military part of his office, but chiefly details his judicial duties as a magistrate, whilst on the contrary the patent to the lords commissioners of the admiralty is very particular in directing them to govern the affairs of the navy, and is wholly silent as to their judicial powers.

These powers, as expressed in the patent to the earl of Pembroke in 1701, are, the power to act by deputy; to take cognizance of all causes, civil and maritime, within his jurisdiction; to arrest goods and persons; to preserve public streams, ports, rivers, fresh waters and creeks whatsoever within his jurisdiction, as well for the preservation of the ships as of the fishes; to reform too straight nets, and unlawful engines, and punish offenders; to arrest ships, mariners, pilots, masters, gunners, bombardiers, and any other persons whatsoever, able and fit for the service of the ships, as often as occasion shall require, and wheresoever they shall be met with; to appoint vice-admirals, judges, and other officers, *durante bene placito*; to remove, suspend, or expel them, and put others in their places, as he shall see occasion; to take cognizance of civil and maritime laws, and of death, murder, and maim.

The office of his majesty's ordnance is kept within the Tower of London. This office has always been one of the greatest importance, as being the only standing and grand national magazine for all the munitions of war, both for the military and naval service, and which superintends, orders, and disposes, the principal magazine in the Tower, as well as at Woolwich, Chatham, Portsmouth, Plymouth, Edinburgh Castle, and everywhere else. Immense quantities of gunpowder, full accoutrements for horse and foot, with ordnance, shot, and other stores in proportion, as well for the naval as the military service, are kept in this royal depot, deposited separately in their several storehouses with great order and care, for their preservation and more speedy despatch in their delivery. It is under the government in chief of the master-general of the ordnance, who is generally a person of great eminence and integrity. The other officers are a lieutenant general, a surveyor, clerk of the ordnance, keeper of the stores, clerk of the deliveries, and the treasurer and paymaster, who all hold their places by patent under the great seal.

The duties of the lieutenant-general are to receive all significations, orders, &c., from the master at the board; to see them duly executed; to make orders, as the king's service shall require, for things of such importance as do not require the king's warrant, or the warrants of the lords of the admiralty. Formerly the master-general's office was more of a sinecure, but of late years he is obliged to be constant in his attendance with the other principal officers, if any business requires their presence. The lieutenant-general of the ordnance gives orders for the firing of salutes upon birthdays and other festivals, and also superintends the artillery and all its equipages.

The surveyor's charge is to survey all his majesty's ordnance, stores and munitions of war in the storekeeper's custody, which he is to arrange in such a manner as shall be for their preservation and safety, ready view, and easy accompt; to allow all bills of debts, and to keep check upon the work of artificers and labourers; to inspect the quality and state of all provisions, that they be good and serviceable, and duly proved with the assistance of the other officers and the proof-masters, and if necessary that they be branded with the king's mark.

The clerk of the ordnance is to record all orders and instructions for the government of the office, likewise all patents and grants, and the names of all the officers, clerks, artificers, attendants, gunners, labourers, and others who enjoy the said grants, or any other fees from the king for the same; to draw all estimates for provisions, supplies, &c.; and all letters, instructions, commissions, deputations, and contracts for his majesty's service; to make all bills of impost, and debentures for the payment of the respective artificers and creditors of the office for work done or provisions received; and quarter books for the salaries, allowances, and wages of all officers, clerks, and other servants belonging to the office; and also to keep journals and ledgers of the receipts and returns of all his majesty's stores: that nothing be bought, borrowed, given, received, lent, or employed, without a regular record thereof, to serve as a check between the two accountants of the office, the one for money, the other for stores.

Under the charge and custody of the storekeeper are placed all the king's ordnance, munitions, and stores belonging to the office. It is his duty to give legal security for their safe-keeping; to make just and true returns from time to time; to reject all provisions whatsoever that are manifestly unserviceable, or before they have been inspected by the surveyor; not to issue any proportion of ordnance, munition, and stores, except the same be agreed upon, and signed by the proper officers, according to the master-general of the ordnance's signification and appointment, warranted by his majesty's sign manual, or six members of the privy



council, or the lords of the admiralty, if the stores be for the use of the royal navy; not to receive back any stores formerly issued, until they have been reviewed by the surveyor, and registered by the clerks of the ordnance; to ascertain that all his majesty's storehouses be in good and sufficient repair and accommodation; and the stores kept in such order and lustre as is fit for his majesty's honour and service.\*

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### ALIENS, DENIZENS, AND NATIVES.

UNDER the name of the people, is included every individual from the highest to the lowest *subject* in the realm: princes, nobility, clergy, magistrates, gentry, and commonalty, all united, compose what is called the people. "The first and most obvious division," says Sir William Blackstone, "of the people, therefore, is into aliens and natural born subjects." The latter are such as are born within the dominions of the British crown; that is, within the allegiance of the king; and the former, or aliens, are such as have been born in the dominions of other sovereigns, and whose allegiance are therefore due to them. Every subject owes allegiance to the king; it is the tie or *ligamen*, which binds the subject to the sovereign, and is the return for that protection which the king affords to him. The substantial part, or thing itself, is founded in reason, the divine law, and the nature of government; but its name and form have descended to us from our feudal ancestors. Under the feudal system every owner of lands held them in subjection to the crown originally, or to some inferior lord, who had obtained of the crown, from whom or his ancestors the tenant or vassal had received them. This produced a natural trust or confidence between the lord and the vassal, that the former should protect the latter in the enjoyment of the land or territory which he had granted him, and the vassal on the other hand reciprocally engaged to be faithful to his lord or superior, and to defend him against all his enemies. The vassal's obligation was called his *fidelitas*, or fealty; and the feudal law required all tenants to take an oath of fealty or fidelity to their landlords, which ran in nearly the same language as our ancient oath of fealty to the crown, professing, "that he did become his *man* from that day forth, of life and limb and earthly honour:" except that in the usual oath of fealty a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, that is the king, it was no longer called the oath of

\* Blackstone's Commentaries—Custance on the Constitution—Chamberlayne's *Anglicæ Notitiæ*—Statutes at Large.

fealty, but of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, *contra omnes homines fidelitatem fecit*; without any saving clause or mental reservation whatever. We have formerly mentioned, that it is "the grand and fundamental maxim of the feudal tenure, that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately of the crown." Land held by this exalted species of tenure was called a *liege fee*; the vassals were designated *liege men*; and the sovereign the *liege lord*. When sovereign princes did homage to each other for lands held under their respective sovereignties, as the kings of Scotland frequently did for lands held by them as proprietors in England, they were always careful to make a distinction between *simple* and *liege* homage. *Simple* homage was merely an acknowledgment of tenure; and *liege* homage, which included the submission and fealty before mentioned, and the services to which that oath bound the recipient. In the year 1329, when Edward III. of England did homage to Philip VI. of France, for his ducal dominions in that kingdom, the nature of the homage was warmly disputed. Philip naturally enough demanded *liege*, and the king of England proffered *simple*, homage. But as it became a settled principle in England, that *all* the lands in the kingdom are holden of the king as their sovereign and lord paramount, the oath of fealty, therefore, could alone be taken to inferior lords, and the oath of allegiance was confined to the person of the king alone. By an easy analogy the term of allegiance was gradually brought to signify all other engagements which subjects owe to their prince, as well as mere territorial duties; and the oath of allegiance contained for upwards of six hundred years, a promise "to be true and faithful to the king *and his heirs*, and truth and faith to bear of life and limb and terrene honour; and not to know or hear of any ill or damage intended him without defending therefrom." These were the exact words also of the oath of allegiance in Scotland, and the clause in italics was the cause of the adherence of the official men and the bishops to the house of Stuart at the Revolution in 1688. Sir Matthew Hale remarks, that this oath was short and plain, not entangled with long and intricate clauses or declarations, and clearly comprehends the whole duty of a subject to his sovereign. At the Revolution the oath of allegiance was altered, the subject simply swearing, "that he will be faithful, and bear *true* allegiance to the king;" this form was introduced by the convention parliament, and is more general and indeterminate than the former, as it neither binds to continue their fidelity to *the heir*, nor in any manner specifies in what that allegiance consists. The oath of supremacy is principally intended as a renunciation of the pope's pretended authority, as no crown can be supreme which has a superior, and it is well known that the pope pretended

to be lord of lords, and king of kings. The oath of abjuration was introduced in the last year of the reign of William III., and was intended to supply the loose and general texture of the oath of allegiance: it runs, "I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, in my conscience before God and the world, that our sovereign lord, king William, is lawful and rightful king of this realm, and all other his majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be the prince of Wales, during the life of the late king James, and since his decease pretending to be and taking upon himself the style and title of king of England, by the name of James III., hath not any right or title whatsoever to the crown of this realm, or any other the dominions thereunto belonging: and I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear, that I will bear faith and true allegiance to his majesty king William, and him will defend to the utmost of my power, against all traitorous conspiracies and attempts whatsoever which shall be made against his person, crown, or dignity. And I will do my best endeavour to disclose and make known to his majesty and his successors all treasons and traitorous conspiracies, which I shall know to be against him or any of them. And I do faithfully promise, to the utmost of my power, to support and maintain, and defend the limitation and succession of the crown, against him the said James and all other persons whatsoever, as the same is and stands limited to his majesty during his majesty's life, and after his majesty's decease to the princess Anne of Denmark, and the heirs of her body, being protestants; and for default of such issue, to the heirs of the body of his majesty, being protestants: and as the same by another act is, and stands limited after the decease of his majesty and the princess Anne of Denmark, and for default of issue of said princess and of his majesty respectively, to the princess Sophia, electress and duchess dowager of Hanover, and the heirs of her body, being protestants. And all these things I do sincerely and plainly acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian."\* This oath might now with great propriety be laid aside, since that illustrious line of princes, against which it was intended to operate, are long since become extinct. It must be taken by all persons in any office, trust, or employment, and may be tendered by

\* Statute 13 Will. III., c. 6.

two justices of the peace to any person whom they may suspect of disaffection to government. The oath of allegiance may be tendered to any one above the age of twelve years, whether natives, denizens, or aliens.

But besides these express engagements, there is also an implied, original, and virtual allegiance, which every subject owes to his sovereign, antecedently and independently of all express promise or oath, even although the subject should never swear allegiance in form. For, as the king, by descent of the crown, is fully invested with all the rights, and is himself bound to perform all the duties of the sovereignty, before his coronation, and even although he never were crowned; so is the subject bound to his prince, by an intrinsic allegiance before the superinduction of those external bonds of oaths, homage, and fealty, which were merely instituted to remind the subject of this his previous and bounden duty, and for the better securing its performance. The formal profession, or oath of subjection, therefore, is nothing more than a verbal declaration of what was previously implied in law. On this subject Sir Edward Coke has the following just and emphatic remark: "that all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same."\* The sanction of an oath, it is true, in case of the violation of the duty, accumulates greater guilt, by superadding treason; but it does not increase the civil obligation to loyalty, it only strengthens the *social* tie by uniting it with *religion*.

Allegiance, whether expressed or implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, whereas the latter is only temporary. That which is natural is due irrespectively from all men born within the king's dominions immediately on their birth, because the moment they are born they are under the king's protection, and that too at a period when from their tender age they cannot protect themselves. Natural allegiance, therefore, becomes on the part of the subject a debt of gratitude, which can neither be forfeited, cancelled, nor altered by any change of time, place, or circumstances whatever, unless by the united concurrence of the legislature. A British subject removing to France, America, or China, still owes the same allegiance to the king of Great Britain, as if he were never to leave the kingdom, and that too were he to be absent for any number of years. It is a principle of universal law, that the natural born subject of one prince, cannot put off or discharge his natural allegiance to his sovereign by any act of his own, no, not even by swearing

\* 2 Inst. 121.

allegiance to another; for the natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act and consent of that prince to whom it was first due. It is true, that the natural born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely by oaths to another; but the subjection to these straits and difficulties, that is, of serving two masters, being his own act, it is unreasonable that he should be able at pleasure, by any such voluntary act of his own, to throw off his allegiance, and unloose the bands which connect him with his natural sovereign. The legal maxim, *nemo potest exuere patriam*, comprehends the whole doctrine of natural allegiance. This is exemplified in the case of a Mr Eneas Macdonald, who was a native of Great Britain, but from his earliest infancy had received his education in France, had enjoyed for many years a profitable employment in that kingdom, and had even accepted a commission in the French king's army. Acting under that commission, he was taken in arms serving against the king of England, for which he was indicted and convicted of high treason; but received a pardon on the condition that he should leave the kingdom, and reside abroad during all the days of his natural life.\*

Local allegiance is what is due by an alien, or a native of a foreign country, being a stranger born, during the time, and no longer, that he continues within the king's dominion and protection. This allegiance naturally ceases the moment that the alien removes to another state or kingdom. It has, however, been laid down by all the judges of England, that "if an alien, seeking the protection of the crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the king's enemies *for purposes of hostility*, he may be dealt with as a traitor."† Our natural allegiance is, therefore, perpetual, but the local allegiance of an alien, with the above exception, is merely temporary; and that for this reason, evidently founded on the nature of government, allegiance being a debt due from the subject, upon an implied contract with the prince, that so long as the latter affords protection, the former must yield an implicit obedience. As, therefore, the prince is always under a constant tie to protect his natural born subjects at all times, and in all countries, for this reason their allegiance due to him, "not only for wrath, but also for conscience' sake," is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, an alien's allegiance is consequently confined (in point of time at least) to the duration of his residence; and (in point of locality) to the dominions of

\* Sir M. Foster, 59.

† Foster, 185.

the British empire. From these considerations Sir Matthew Hale deduces this consequence: "that though there should be an usurper of the crown, yet while he is in full possession of the sovereignty, it is treason for any subject to practise any thing against his crown and dignity; and, therefore, although the true prince should regain his sovereignty, attempts formerly made against the usurper (unless these have been made in defence or aid of the rightful king) have always been punished with death, on account of that temporary allegiance which was due to the usurper as king *de facto*. And after king Edward IV., of the house of York, recovered the crown, which had been usurped by three successive sovereigns of the house of Lancaster, treasons committed against Henry VI., the last usurper of that line, were capitally punished; though Henry himself had been declared by parliament an usurper."

This oath of allegiance, or rather the allegiance itself, is held not only applicable to the political capacity of the king, or regal office, but also to his natural person, or blood royal. For the misapplication of their allegiance to the crown or regal capacity, exclusive of the person of the king, the Spencers were banished in the reign of Edward II. Hence arose that principle of personal attachment and affectionate loyalty, which induced our forefathers on various occasions, but especially in the case of the princes of the house of Stuart, to hazard all that was dear to them—life, fortune, and family—in defence and support of their liege lord and sovereign. I have no doubt but the same principle would actuate their sons, were it God's will that their loyalty to the house of Brunswick should be tried in the same fiery furnace.

This allegiance, therefore, both expressed and implied, is the peremptory duty of all the king's subjects, divided however into the natural distinctions of local and temporary, or universal and perpetual. Their rights are also distinguished by the same criterions of time and locality, natural born subjects having a great variety of rights, which they acquire by their birth, and can neither forfeit by distance, place, nor time, except by their own misconduct in the breach of any known law. Aliens are in some degree in the same position, though their rights are much more circumscribed, being acquired only by their residence within the king's dominions, and of which they are deprived whenever they withdraw from his protection. I will endeavour to point out some of the principal lines whereby they are distinguished from native subjects, descending to farther particulars as they come in course.

An alien born may purchase lands or other estates, but not for his own use; for the king is thereupon entitled to them. A woman alien cannot be endowed, unless she marries by the king's license; in which case she may be endowed: neither can a husband alien be a tenant by courtesy,

that is, hold an estate in right of his wife. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent as that property, to the king of Great Britain, and which would of course be inconsistent with the allegiance which he owes to his own natural liege lord; and besides, in process of time, the nation might become subject to foreign influence, and of course liable to many inconveniences. Among other reasons which might be given for the constitution of this point, it seems to have been intended by way of punishment for the alien's presumption in attempting to procure any landed property, that by the civil law such contracts were made void. For the vender is not affected by it, he having resigned his right, and received an equivalent in exchange. Nevertheless, an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation; because personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade and commerce. Aliens may trade as freely as other people, only they were subject to certain higher duties at the customhouse, but which were removed by the 24 George III. There were also some obsolete statutes of Henry VIII., which prohibited alien artificers from working for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Elizabeth, c. 7. But Mr Hargrave says, that the statute 32 of Henry VIII. is still unrepealed, notwithstanding its apparent opposition to good policy and the improved spirit of commerce and the age in which we live.\* An alien may bring an action concerning personal property; may make a will, and dispose of his personal estate in Great Britain; but it is not so in France, when on the death of an alien, the king is entitled to claim and take possession of all his property, by the *droit d'aubaine*, or *jus albinatus*, unless indeed the alien enjoyed any peculiar exception. But when these rights of an alien are mentioned, it must be borne in mind that it is only friendly aliens, that is, the natives of those countries which are in peace and amity with ourselves, who are entitled to these privileges. Aliens, or natives of foreign countries at war with ourselves, have no such rights and privileges during the continuance of the war, unless by the king's special favour. But an alien enemy could sue in our courts on a ransom bill, before all ransoms of captured ships were prohibited by statute 22 Geo. III., c. 2.; and Lord Mansfield, in a case of that kind, declared from the bench, that "it was sound policy as well as good morality, to keep faith with an enemy in time of war. This is a contract which arises out of a state of hostility, and is to be governed by the law of nations and the eternal rules of justice."†

\* Coke. Litt. 2. n. 7.

† Doug. 625.

When it is said, that an alien is one that is born out of the king's dominions or allegiance, it must be understood with some degree of restriction. Before the Restoration, the common law, with a very few exceptions, made every man born out of the kingdom an alien, so that after that happy event, when the throne and the altar were restored, a particular act of parliament became necessary "for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles."\* This maxim of the common law proceeded on the general principle that every man owes a natural allegiance to the sovereign under whose protection he is born, and that he cannot owe two such allegiances, or serve two masters at once. The children of the king's ambassadors born abroad were always held to be the king's natural subjects, because the father, though residing in a foreign country, owes not even a local allegiance to the prince to whom he is sent, but is the representative of his own sovereign, who owes allegiance to no man. So also with regard to his son; he was supposed by a sort of fiction to be born under the king of Great Britain's allegiance, represented by his father the ambassador. In the same sense the children of other British subjects who are born under the roof of the British ambassador, are, to all intents and purposes, British subjects, and not the subjects of that sovereign in whose dominions they are born. It is, therefore, very customary for our countrywomen residing abroad, to repair for their accouchement to the house of his majesty's ambassador, which preserves their rights as British subjects. To encourage foreign commerce, it was enacted† that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the sea by her husband's consent, might inherit as if they had been born in England; and it has accordingly been so adjudged in behalf of merchants. But by several statutes of more modern date, these restrictions have been still farther taken off, so that all children born abroad in foreign countries, whose *fathers* (or *grandfathers* by the father's side) were natural born subjects, are now esteemed natural born subjects themselves. Unless indeed these said ancestors were attainted or banished beyond sea for high treason, or were at the birth of such children in the service of a prince at enmity with the crown of Great Britain. All these exceptions to the common law, however, are in cases where the father or grandfather is a natural born subject; but there is no provision made for the children who have been born abroad, of a *mother* a natural born British subject who has married a foreigner. And in the case of the count Durore, who was a Frenchman, and had married an Englishwoman, by whom he had a son born in France, it was decided that

\* Statute 29 Car. II., c. 6.

† 25 Edward III., st. 2.



the son could not inherit his mother's lands in England, because he was to all intents and purposes an alien. Yet the grandchildren of such male ancestors are not privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; neither are they enabled to claim any estate or interest, unless the claim is made within five years after the same shall accrue.

The children of aliens born in Great Britain are, generally speaking, esteemed natural born subjects, and entitled to all the privileges of such, unless the alien parents are acting in the realm as enemies. In this particular the constitution of France differs from ours; for by their *jus albinatus* in that kingdom, a child born of foreign parents is an alien.

A DENIZEN is an alien born, who has obtained, *ex donatione legis*, letters patent from the king to make him a British subject, a high and incommunicable branch of the royal prerogative. A denizen is, therefore, a sort of middle state between an alien and a natural born subject, and partakes of both their natures. He may either purchase lands at his discretion, or succeed to them by will or devise, neither of which an alien can do, but he cannot take by inheritance, which a natural born subject can do; for the denizen's parent, through whom he must claim, being an alien, had consequently no inheritable blood, and therefore could not convey any to his son. And upon a like defect of hereditary blood, a denizen's issue born *before* denization, cannot inherit his real property, but his issue born *after* may. A denizen is not excused from paying the alien's duty, and some other mercantile burdens. All denizens are absolutely barred the privilege of being either members of the privy council, or of the great council of the nation—parliament—and that too either of the house of peers or commons. Neither can they enjoy any office of civil or military trust, nor be capable of accepting any grant of lands from the crown. Natural born subjects may devise a title by descent, through their parents or any ancestor, though they may have been aliens. But by a subsequent statute,\* the following restriction has been superadded: that no natural born subject shall devise a title through an alien parent or ancestor, unless he be born at the time of his ancestor's death, who dies seised of the estate which he claims by descent. With this exception, that if a descent shall be cast upon the daughter of an alien, it shall be divested in favour of an after born son; and in case of an after born daughter or daughters only, all the sisters shall be co-parceners.

NATURALIZATION can only be performed by act of parliament, for the act of naturalization puts the alien in exactly the same state as if he had been born under the king's allegiance, with this exception, that he,

\* 11 & 12 W. and M., c. 6. 25 Geo. II., c. 30.

as well as a denizen, is incapable of being a member of the privy council or parliament, or of holding offices, grants, &c. This restriction was found necessary by our ancestors after the Revolution, arising out of a jealousy of the partiality which the prince of Orange so glaringly showed towards his Dutch favourites, on whom he bestowed titles, and would have bestowed all the crown lands in the kingdom, had not the parliament remonstrated with him in a way not to be misunderstood.\* Without this disabling clause, no bill of naturalization can be received; nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall reside in Great Britain for seven years next after the commencement of the session in which he has been naturalized. Neither can any person be naturalized or restored in blood, unless he has received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. But in the cases of foreign princes and princesses, these provisions have usually been dispensed with by special acts of parliament, previous to the introduction of bills for their naturalization.

These are the principal distinctions between aliens, denizens, and natives, and which parliament has frequently endeavoured to set aside since the Revolution by one general act of naturalization in favour of all foreign protestants. It was attempted in the reign of queen Anne. But after three years' experience of its inexpediency, it was repealed, with the exception of the clause which has just been mentioned for naturalizing the children of British parents born abroad. Every foreign seaman who serves for two years in time of war on board a British man of war is, by virtue of the king's proclamation, *ipso facto* naturalized, under the restrictions, however, of the statute of 12 Wil. III., already noticed; and all foreign protestants and Jews, after a residence of seven years in any of the American colonies, without having been absent for more than two months at a time, and also all foreign protestants who have served two years there in a military capacity, or have been employed for three years in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities already mentioned, shall on taking the oaths of allegiance and abjuration,† or, in some particular cases, an affirmation to the same effect, be naturalized to all intents and purposes, as if they had been natural born subjects of the British crown. Except as to sitting in parliament, holding offices, and receiving grants of land, &c. from the crown. They are therefore admissible to all the other privileges to which protestants or Jews born in

\* 12 Wil. III.

† 4 Geo. II., c. 21.

this kingdom are entitled. The famous Jew bill in the year 1753, was the subject of very high debates, but which was carried,\* and enabled all Jews to prefer bills of naturalization in parliament without receiving the sacrament of the Lord's supper according to the rites of the church of England, which had been ordained by the statute passed in their favour by James I. This statute, however, was only in force a few months, and was repealed the following year: "that the above mentioned act, and the several matters and things therein contained, shall be, and is, and are hereby repealed and made void to all intents and purposes whatsoever."†

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### THE CLERGY.

THE PEOPLE, whether aliens, denizens, or natural born subjects, are divisible into two kinds, clergy and laity. Aliens and denizens have been already discussed. The following section will be devoted to the clergy, comprehending all persons in holy orders, and in ecclesiastical offices. The lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of the clergy, are divided into the distinct states of the civil, the military, and the maritime, have been already described, and we therefore refer to them merely in this place.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend more closely to the service of Almighty God, have in consequence considerable privileges allowed them by the municipal laws of these kingdoms, which formerly were much greater, but which were greatly abridged at the Reformation, on account of the abominable abuses which had crept into the whole body of the Romish clergy. The laws having exempted them from almost every personal duty and obligation, they attempted to relieve themselves from every secular tie. In reflecting on this most absurd abuse of their reasonable privileges, Sir Edward Coke observes, "that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them."‡ The personal exemptions which the Romish clergy enjoyed, still for the most part continue to be enjoyed by their protestant successors. A clergyman in any part of Great Britain, cannot be compelled to serve on a jury, nor to appear at a court leet, or view of Frankpledge in England or

\* 26 Geo. II., c. 26.

† 27 Geo. II., c. 1.—Blackstone's Commentaries, with Professor Christian's Notes, &c. Statutes at Large

‡ 2 Inst. 4.

Ireland, which almost every other person in these two kingdoms is obliged to do: but if a layman should be summoned on a jury, and before the trial takes place he should take holy orders, he must notwithstanding appear at the trial and be sworn. A clergyman cannot be chosen to any temporal office, such as bailiff, reeve, constable, or the like, in regard of his own continual attendance on his sacred functions. He is privileged from being arrested for civil suits during his performance of divine service, that is for a reasonable time, *eundo, redeundo, et morando*, in going, returning, and remaining to perform divine service. Also in cases of felony, a clerk in orders, that is a clergyman, could have had the benefit of clergy, without being branded in the hand, and that too more than once; in both which particulars he was distinguished from a layman. This was a peculiar privilege of the clergy of the church of England, that sentence could never be passed on them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences; but a layman, even a peer, might have been ousted of clergy, and subjected to the sentence of death on a second conviction for a clergyable offence; for if a layman had once been convicted of manslaughter, he might for bigamy, or any other felony within the benefit of clergy afterwards suffer death, on production of the previous conviction, although any of these crimes for the *first* offence would not subject a man to the punishment of death. But for the honour of that numerous class of his majesty's subjects, there has never almost been an instance in which they have had occasion to claim the benefit of this privilege.

Benefit of clergy, *privilegium clericale*, being now wholly abolished,\* the law on the subject is of little more use now than as a matter of history or curiosity. It had its origin in the pious regard paid by Christian princes to the church in its infant state, and the ill use which the Romish clergy made of that piety. The exemptions which their piety induced them to make, were principally of two kinds: 1. Exemption of *places* consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries. 2. Exemptions of the persons of the clergy from criminal process before a secular judge, in a few particular cases, which was the true original and meaning of the *benefit of clergy*. "The wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchymy rich medicines out of poisonous ingredients; and converted by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment." But as the clergy have their privileges, so also they have many disabilities,

\* 7 & 8 Geo. IV., c. 28.

on account of their spiritual avocations. The clergy are incapable of sitting in the house of commons, because they sit in the convocation, which is in fact part and parcel of the parliament. A committee of the house of commons in 1785, decided that a gentleman, who had been regularly admitted to *deacon's* orders, was incapable of being a member of that house. Many of the arguments in that case might with equal force be urged for the admission or exclusion of a person in *priest's* orders. The chief authorities for the exclusion of the clergy, are certain entries in the journals of the house of commons, where it is urged that persons returned being clerks, they either have or might have a voice in the house of convocation. Lord Coke says, "that none of the clergy, though they be of the lowest order, are eligible, because they are of another body, that is, of the convocation;" and he refers\* to an entry in the commons' journals. But besides these authorities, there are canons of the church which prohibit the clergy from *voluntarily relinquishing the office of a deacon or minister*, from using themselves in the course of their lives as laymen, and from *exercising secular jurisdictions*. Mr Woodeson has observed,† that the arguments from the convocation ought not to be urged against *unbeneficed* clergymen, as they can neither sit in the convocation, nor vote for the proctors or representatives in convocation.

The same reason for disqualifying the inferior clergy from sitting in the house of commons, were it good, might be applied for the exclusion of the bishops from the house of lords, because they sit of right in, and form the upper house of convocation, to which they are summoned by the king's writ, and are not elected like the members of the lower house of convocation. It frequently happens that a lay peerage descends to a clergyman in priest's orders: but it has never been supposed, even although he should obtain a benefice, that his sacred character would disable him from taking his seat in the house of peers. Until the Reformation, twenty-nine of the regular clergy, abbots and priors, who were dead in law to most other purposes, had seats in the house of lords in consequence of the lands which they held *in capite* of the crown. In Scotland, the three estates sat and voted together in one chamber. It would have been unaccountable, if by the common law holy orders had excluded one of these estates from parliament, and not the others; but both in Scotland and Ireland, the clergy were declared to be ineligible by statute; by which we may clearly infer, that without the authority of an act of parliament, the clergy would of common right have participated in this privilege with other subjects. Mr Hody very justly calls the argument drawn from the convocation *a new pretence*, which was resorted to in the time of queen Mary of bloody memory,‡ in order to exclude some protestant clergy from the house of

\* 4 Inst. 47.

† 1 Gibs. Cod. 180. 184.

‡ Wight, 293. Lord Mountm. 50.

commons. In the time of Richard II., there is a remarkable instance of a clergyman, who signalized himself in the house of commons:\* he is called Sir Thomas Haxey, clerk. He introduced a bill, which passed the commons, to lessen the king's expenses, and to remove bishops and ladies from his court, for which the commons were obliged to make concessions, and to surrender the author of the bill to the king. He was tried by parliament, and condemned to die as a traitor; but his life was spared by the intercession of the bishops, because he was a clergyman. His boldness, however, shows that he had no suspicion that his title to a seat in parliament could be questioned. As little weight is due to the arguments drawn from the canons as to those from the convocation; for by proving too much they prove nothing; for were these available, the canons would also preclude the clergy from acting in the commission of the peace, a secular jurisdiction which they have long exercised. If the clergy were eligible prior to the enactment of the canons, or independent of their authority, then the validity of those made antecedent to the 25th Henry VIII. may be justly questioned; for eligible persons might in all cases, and may still in some, be compelled to serve in parliament against their own consent; and no set of men ought to be allowed to disable themselves, and deprive their country of their services by any laws of their own making, which are not expressly confirmed by the king's authority. The objection to a clergyman's eligibility does not seem to be much stronger, even when he is beneficed; for from the residence enforced by the spiritual judge, the ninth chapter of the *articuli clerici* exempts and privileges those who are engaged in the service of the king and commonwealth; "*nec debet dici tendere in prejudicium ecclesiasticæ libertatis, quod pro rege et republica necessarium invenitur*"; whatever is found to be necessary for the king and the commonwealth, ought not to be held prejudicial to ecclesiastical liberty: a declaration which lord Coke says ought to be written in letters of gold. An attendance in parliament is pre-eminently "*pro rege et republica necessarium*, necessary for the king and commonwealth," and the presence of the clergy there would prevent many prejudices and false statements regarding the church from going abroad through the medium of the speeches of honourable members, which are made sometimes in ignorance, and not infrequently from malice *prepense*. The late Mr Canning, for instance, accused the church of England of holding the doctrine of *consubstantiation*, and there being no one to contradict such a libel on the church, it went abroad to the world as doctrine of that church. Whereas *consubstantiation* and *transubstantiation* being *substantially* the same thing, every member of the house of commons, at the time

\* Councils and Convocations, 429.

when that memorable speech was made, had taken the oath against it, and sworn that they did not believe one word of any such doctrine. Had a clergyman been eligible to sit in parliament, and been present, his contradiction of this dogmatic assertion would have placed the "bane and antidote" before the public at the same time, and prevented the ill effects of such a speech on the public mind.

With regard to the residence required by the statute of Henry VIII.,\* Professor Christian is of opinion that important rights and franchises are not lost or destroyed, merely because they become in some degree inconsistent with the provisions of a new statute, which is entirely silent respecting them. If that were the case, the beneficed clergy must have also lost their capacity to sit in convocation; for though the statute makes exceptions in cases of absence, as formerly, on pilgrimages and the king's service abroad, yet there is no exception for attendance on the convocation. But even at the time when the clergy taxed themselves in convocation, that circumstance was not adequate to bar them from electing, or being elected to parliament. Taxation is certainly an important branch of legislation, yet it is far from being the whole concern of that power which superintends and protects our lives, our liberties, and our property. When the clergy ceased to tax themselves, the reason for their sharing in the rights and privileges of representation was strengthened, *but not created*. After the clergy, in their convocation, granted the last subsidy in 1663, and were afterwards taxed in parliament, as if this alone had precluded them from a share of parliamentary representation, they tendered their votes at county elections in right of their glebes, which have ever since been received with tacit approbation. But the capacity to elect and to be elected being originally the same, when you take away an obstruction from the one, you remove it from the other also, unless some express law has superinduced a further impediment. But the learned professor apprehends that the reason why the clergy, having no other lands than their glebes, never voted nor were elected in ancient times, did not in any degree depend either on taxation or the convocation; but that it was owing entirely to the tenure of their glebe lands, *viz. frankalmoign*, which exempted them from attendance on the courts of the king, the lords, or the sheriffs; and even if they held other lands, holy orders exempted them by the common law from secular services and temporal offices: this privilege was confirmed by magna charta and the statute of Marlbridge. This was an exemption, but not an exclusion. But what have now become important rights, were originally considered burdensome duties. It is not strange, therefore, that the clergy should avail themselves of this privilege, till the disuse became regarded as an incapacity.† These glebe lands are their

\* Stat. 21, c. 13.

† 8 Henry VI., c. 7.

freeholds. When they were admitted to vote in right of these freeholds, it followed as a consequence, that they were also eligible to represent, unless some better authority can be produced for their exclusion, than merely *disuse*, or their having a voice in the convocation, where they no longer tax themselves, or their being prohibited by canons which in other instances are disregarded, and which probably could never be esteemed obligatory on parliament.

Mr Horne Tooke, a gentleman who had taken priest's orders early in life, but who had long ceased to officiate, or even to appear as a clergyman, was returned for Old Sarum. No petition having been presented within the time limited by Grenville's act; one of the members moved for the appointment of a committee to search for precedents respecting the eligibility of the clergy to sit in the house of commons. This committee afterwards reported, that there are few instances with particular additions till the 8th of Henry IV., for then the practice of returning citizens and burgesses by indentures annexed to the writ first prevailed, yet they find five, with the addition of *clericus*. The committee state also, that no such name as Sir Thomas Haxey, formerly mentioned, exists in the returns of the 20th Richard II., which are perfect and extant in the Tower. It appears, however, by a record in *Rymer's Fœdera*,\* that Sir Thomas Haxey was not a member of the house of commons, but the earl of Nottingham's proxy in the house of lords. At that period, namely, in the reign of Richard II., commoners might act in the absence of peers, as their proxies. Although it is manifest from this record, that Haxey was not a member of the house of commons, yet the inference from the case is plain, that if any prohibition in the canon law would have prevented him from representing a county or borough in the house of commons, the same obstacle would have prevented him from exercising the lay functions of a temporal peer in the house of lords.

When the question of the eligibility of the clergy to sit in the lower house of parliament was discussed in the commons, the prime minister proposed that a bill should be brought in to declare the clergy ineligible, by which means all doubts and questions might for the future be removed. The debate in both houses went chiefly on the point, whether this statute would be declaratory of what was already the law, or introductory of a new one. Those who maintained the clergy's ineligibility, argued chiefly from the canon law; but the opposite party, particularly lord chancellor Thurlow, adopted most of the arguments which we have just enumerated as the sentiments of the learned editor of Sir William Blackstone's commentaries. By an act† to remove doubts respecting the eligibility of

\* Tom. VII. p. 844.

† 41 Geo. III., c. 73.



persons in holy orders to sit in the house of commons, it was declared and enacted, that no person having been ordained to the office of a priest or deacon, is or shall be capable of being elected to serve in parliament as a member of the house of commons; and if any such person shall sit in the house, he shall forfeit £500 a-day, and be incapable of holding any preferment or office under his majesty. But the statute was not to extend to the members of the house during the continuance of that parliament. Formerly the clergy were excluded from the parliaments of Scotland and Ireland, and now by this statute they are excluded from the commons' house of the imperial parliament of Great Britain.

Although the clergy have some privileges peculiar to their sacred office, yet they are not without their disabilities also, on account of their spiritual functions. From what we have said above, they are incapable of sitting in the house of commons,\* and they are not in general allowed to take any lands or tenements to farm, under a penalty of ten pounds a-month, and a total avoidance of the lease; but by a subsequent act† passed for the purpose of consolidating and amending the existing laws relative to spiritual persons, this clause has been repealed. The second section of the act forbids all spiritual persons from occupying and cultivating any lands exceeding in the whole eighty acres, without his bishop's consent, under a penalty of £40 per acre. By the third clause they are equally forbidden to engage in any trade or dealing for gain, under the penalty of forfeiting the goods thus trafficked in. All spiritual persons engaged in keeping schools, and giving instruction for profit and reward, are however exempted from the operation of this clause; neither does it extend to goods bought or resold for domestic purposes, provided the same were originally purchased *bona fide* for absolute use. But they are not to sell their produce in any market or place of public sale. They cannot keep any tanhouse or brewhouse, under a penalty of ten pounds per month. This singular prohibition against a tanhouse, probably originated in some practice peculiar to the times when the act was passed. A clergyman cannot engage in any manner of trade, nor sell any merchandise whatever, under the penalty of forfeiting treble the value. But though a clergyman is subject to penalties for trading, yet his contracts are valid, and he is liable to be made a bankrupt.

In the frame and constitution of ecclesiastical polity there are several ranks and degrees, which shall be considered in their respective order, merely as they are taken notice of in the secular laws of England, without intermeddling with the canons and constitutions, in this place at least, by which the clergy have bound themselves. . When we come to treat of the convo-

\* 21 Henry VIII., c. 13.

† 57 Geo. III., c. 99.

cation of the church of England, and the general assembly of the church of Scotland, we will add such farther particulars regarding each as do not fall within the scope of this article. Meantime we will consider each division of this important portion of *the people*, in three points of view:

1. The method of their appointment; 2. Their rights and duties; and,
3. The manner wherein their character or office may cease.

I. An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a license from the crown. In very early times, election was the usual mode of elevation to the episcopal chair, throughout all Christendom, which was promiscuously performed by the laity as well as the clergy, till in time it became tumultuous, and the emperors and other sovereigns of the respective kingdoms of Europe, took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities which soon began to be universally annexed to this spiritual dignity. The elected bishop could neither be consecrated, nor receive any secular profits, without having previous confirmation and investiture. Pope Adrian I., and the council of Lateran, in the year 773, acknowledged this right to be vested in the emperor Charlemagne, and it was universally exercised by all other Christian princes: but the policy of Rome began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, and which at length they completely effected. The laity yielded their privilege the more readily, that they soon practically discovered that it was a right of very little consequence, so long as the crown or the pope was in possession of an absolute negative, which was in fact equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England, as well as the other kingdoms of Europe, even in the Saxon times; because the rights of confirmation and investiture were in effect, though not formally, a right of complete donation.\* But when by length of time the custom of making elections by the clergy alone was fully established, the popes began to except against the usual method of granting these investitures, which was *per annum et baculum*, by the prince delivering to the prelate elect a ring and pastoral staff, or crosier. Pretending that this was an encroachment on the church's authority, and an attempt to confer a spiritual jurisdiction by these symbols, pope Hildebrand, commonly called Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold and effectual step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this unjustifiable claim of the pope. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures in his dominions for the future *per sceptrum*, and not as formerly, *per annum et baculum*; and when the kings of England and France consented to alter the forms in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them with the ring and crosier, the court of Rome found it prudent to suspend its other pretensions till a more convenient season.

This concession was obtained from Henry I. of England, glad to compound his rights with that obstinate and arrogant prelate, archbishop Anselm, in the year 1107; but about a century afterwards, in order to obtain the protection of the pope against the rebellion of his discontented barons, king John was also prevailed on to concede to all the monasteries and cathedral churches in the kingdom, the free right of electing their prelates, whether they were abbots or bishops, reserving to the crown only the custody of the temporalities during the vacancy. On the refusal of the form of granting a license to elect, (which is the original of the *conge d'élire*,) the electors might proceed without it; the crown claiming the

\* Selden.

right of subsequent approbation, which was not to be denied without a reasonable and just cause. King John expressly recognized this grant in his famous Great Charter, to which we refer our reader, and was re-established by Edward III.\*

But on the suppression of the pope's supremacy at the Reformation by Henry VIII.,† the ancient right of nomination was in effect restored to the crown. It was enacted that at every future avoidance of a bishopric, the king may send his usual license to the dean and chapter to proceed to election. This statute was afterwards repealed by Edward VI., and it was then enacted, that all bishoprics should be donative as formerly. The statute of Edward VI. states in the preamble, that these elections are in very deed no elections; but only by a writ of *conge d'elire*, have colours, shadows, or pretences of election. This is certainly good common sense; for the permission to elect, where a power of rejection does not exist, can hardly be reconciled with freedom of election. This statute was again repealed by Mary. The bishoprics of the new foundation were always donative, and all the Irish bishoprics are so. If the dean and chapter delay their election above twelve days, the nomination devolves on the king, who may by letters patent appoint such persons as he pleases. The election or nomination of a bishop must be signified by the king's letters patent to the archbishop of the province; but if it be of an archbishop, it must be signified to the other archbishop and two other bishops, or to four bishops, requiring them to confirm, invest, and consecrate the person so elected; which they are bound to perform immediately, and without any application to the see of Rome. After which the bishop elect shall sue the king for his temporalities, shall make oath to the king and to none other, and shall take restitution of his secular possessions out of the king's hands only. It is a prevailing vulgar error, that, before accepting the bishopric which is offered to him, every bishop affects a maiden coyness, and answers *nolo episcopari*. The bishops do not give any such answer at present, and it is more than probable that they never did at any time in this country. And if any such dean and chapter do not elect in the manner appointed in the act, or if the archbishop or bishop should refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *premunire*. In the form of consecrating bishops, it is directed and confirmed by various statutes since the Reformation, that at his consecration a bishop must be full thirty years of age. But in popish times there do not seem to have been any such restrictions; for all history is full of instances of bishops and archbishops being appointed by the plenitude of the pope's power even in infancy. The archbishopric of St Andrews was held by an illegitimate son of James IV., who, doffing the episcopal robe, and encased in armour, was killed at the early age of eighteen years, fighting side by side with his royal father at Flodden Field.

The church of England is governed by two archbishops and twenty-four bishops, besides the bishop of Sodor and Man, who is not a lord of parliament. The church of Ireland is governed by four archbishops, and formerly eighteen bishops: but a recent act of parliament has reduced the whole number of archbishops and bishops to eleven. An archbishop is the chief bishop of the province. Next under the king he has supreme power, authority, and jurisdiction, in all causes and things ecclesiastical. In Italy the title of an archbishop is merely a title of honour; he has the precedence of, but no power or authority over other bishops. Metropolitan is a title given to the bishop of the *chief* city of a province. He is also styled primate, because he is *primus*, or first in the province. A patriarch is the chief bishop over several kingdoms or provinces, as an archbishop is of several dioceses.‡

An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them for notorious causes. In the eleventh year of William III., the bishop of St David's was deprived for simony and other offences, in a court held at Lambeth before the archbishop of Canterbury, who called six other bishops to his assistance. The bishop of St David's appealed to the delegates, who affirmed the archbishop's sentence; and after several fruitless applications to the court of king's bench and the house of lords, he was at last obliged to submit to the archbishop's judgment. In his own diocese the archbishop exercises episcopal jurisdiction,

\* Statute 52. c. 6.

† 25 Henry VIII., c. 20.

‡ Burns' Ecclesiastical Law.

as the other bishops do in theirs; and he exercises archiepiscopal authority in his province. In his official capacity as an archbishop, on receipt of the king's writ, he calls the bishops and clergy of his province to meet in convocation; but as the law stands, he cannot assemble them without the king's writ. All appeals are made to him from inferior jurisdictions within his province; and as an appeal lies from the bishops in person to the archbishop in person, so it also lies from the consistory court of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is the guardian of its spiritualities, and the king of its temporalities; and he executes all ecclesiastical jurisdiction in such vacant dioceses. During the vacancy of an archiepiscopal see, the dean and chapter are its spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if they have not presented within six months. And the archbishop has a customary prerogative, when he consecrates a bishop, to name a clerk or chaplain of his own to be provided for by such suffragan bishop. In lieu of which it is now customary for the bishop to make over by deed to the archbishop, his executors, and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose, which is therefore called his *option*; which is only binding on the bishop himself who grants it, but not on his successors. The consequence, therefore, is, that the archbishop can never have more than one *option* at once from the same diocese. These *options* become the private patronage of the archbishop, and on his death are transmitted to his personal representatives, and not to his official successors. The archbishop may direct by his will to whom his executors shall present on a vacancy; which direction is obligatory on his executors to observe, according to a decision of the house of lords.\* If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; and likewise if a bishop dies after an *option* becomes vacant, and before the archbishop or his executors has presented, and the clerk is instituted, the crown, *pro hac vice*, will be entitled to present to that dignity or benefice. For the bishop's grant of the *option* to the archbishop has no efficacy beyond the bishop's life. The archbishop's prerogative itself, seems to have been derived from the legatine powers formerly in popish times annexed by the popes to the metropolitan of Canterbury.† And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative *præmæ*, or *primariæ preces*, whereby the emperor exercises from time immemorial a right of naming to the first prebend that becomes vacant after his accession in every church throughout the empire. A right that was also exercised by the crown of England in the reign of Edward I., and which probably gave rise to the royal coronations.

The archbishop of Canterbury is primate and metropolitan of all England, and has under him in his province twenty-one bishops, viz. Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph. These were founded before the Reformation; after that era Henry VIII. founded the following, Gloucester, Bristol, Peterborough, and Oxford. Under the archbishop of York are four bishops: viz. Chester, Durham, Carlisle, and Sodor and Man. The four archbishops of Ireland, are Armagh, who is primate of all Ireland; Dublin, primate of Ireland; Cashel, primate of Munster; and Tuam, primate of Connaught. They have two concurrent jurisdictions: one as ordinary or bishop within his own diocese; the other as superintendent over all the bishops within his province, to correct and supply their defects.‡

It is likewise the privilege by custom, for the archbishop of Canterbury to crown the kings and queens of Great Britain; and it was the privilege of the archbishop of St Andrews to crown the kings and queens of Scotland. It is said that the archbishop of York has the privilege of crowning the queen consort, and to be her perpetual chaplain.§ The archbishop of Canterbury has also the power of granting dispensations in any case not contrary to the

\* Burns' Ecc. Law.    † Sherlock of Options.    ‡ Burns' Ecc. Law.    § Ibid. p. 178.

Holy Scriptures and the law of God, which were formerly granted by the pope,\* and which is the foundation of his granting special licenses to marry at any time or place, to hold two livings, and the like. And on this also is founded the right he exercises of conferring degrees in prejudice of the two universities. When the dominion of the pope was overturned in this country, this prerogative of dispensing with the canons of the church was transferred by that statute to the archbishop of Canterbury, in all cases in which dispensations were accustomed to be obtained at Rome; but in unaccustomed cases the matter is always referred to the king in council. The pope took upon him to dispense with every ecclesiastical canon and ordinance. But in some of the cases where the archbishop alone has authority to dispense, his dispensation with the canon, such as to hold two livings, must be confirmed under the great seal. But although the archbishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as, for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined by 31 Henry VIII., c. 13, to the two universities.

Besides the administration of certain holy ordinances peculiar to that sacred order, the power of an archbishop principally consists in inspecting the manners of the people and clergy, and punishing them by ecclesiastical censures in order to their reformation. For this purpose he has several courts under him, and may visit at pleasure any part of his province. He appoints his chancellor to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers if lay or married, must be a doctor of the civil law in some university. It is also the business of a bishop to institute, and to direct induction to all ecclesiastical livings in his diocese.

Archbishoprics and bishoprics may become void by death, deprivation for any very gross or notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan, or archbishop of his province; but the archbishop can resign to none but the king himself. An archbishop has the titles and styles of *Grace*, and *Most Reverend Father in God by Divine providence*; the bishops those of *Lord*, and *Right Reverend Father in God by Divine permission*. Archbishops are enthroned, and bishops are installed.

II. A dean and chapter are the bishop's council, to assist him with their advice in affairs of religion, and also in the temporal affairs of his see. When the rest of the clergy were settled in the several parishes, the dean and chapter were reserved for the celebration of divine service in the bishop's own cathedral. The chief of those who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend ten canons or prebendaries, that is, clergymen.

All the ancient deans are elected by the chapter, by *conge d'etire* from the king, and letters missive of recommendation, in the same manner as the bishops; but in those chapters that were founded by Henry VIII., out of the spoils of the dissolved monasteries, the deanery is donative, and the installation is merely by the king's letters patent. The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes they are elected by each other. The new deans and chapters which Henry VIII. added to the old bishoprics, are eight, viz. Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. That bluff monarch founded five new bishoprics, with new deans and chapters, out of the lands of the suppressed monasteries, viz. Peterborough, Chester, Gloucester, Bristol, and Oxford. He also founded a bishopric at Westminster, and Thomas Thirlby was the only bishop that ever filled that see. He surrendered the bishopric to Edward VI., 30th March, 1550; and on the same day it was dissolved, and re-annexed to the see of London. Queen Mary afterwards filled the church with Benedictine monks; and Elizabeth, with the concurrence of parliament, turned it into a collegiate church subject to a dean.

As before observed, the dean and chapter are the nominal electors of a bishop. The

\* 25 Henry VIII., c. 21.

bishop is their *ordinary* and immediate superior; and, generally speaking, has the power of visiting them, and checking any irregularities into which they may fall. They had also a check on the bishop at common law, for till the statute 32 Henry VIII. the bishop's grant or lease would not have bound his successors unless confirmed by the dean and chapter.

Deaneries and prebends may become void, like a bishopric, by death, deprivation, or by resignation to either the king or the bishop. And it may be once for all observed, that if a dean or prebendary, or other spiritual person, be made a bishop, all the preferments of which he was before possessed become void, and the king may present to them in right of his prerogative royal. They are not void by the election, but only by the consecration.

Every diocese in England is divided into archdeacons. There are sixty altogether; and again each archdeaconry is subdivided into deaneries. Deaneries are again parted into parishes, towns, and hamlets. The divisions into parishes were not done at first, but a considerable time after the introduction of Christianity. For many centuries after Christ, every bishop was universal incumbent of his diocese, and which was originally called a parish. He lived at the mother church or cathedral, and all his clergy lived in common with him. Although the bishop sent out clergy to reside constantly in newly erected stations, yet he still reserved a certain number in his cathedral to counsel and assist him. These were afterwards named deans and prebendaries, or canons.

In their original institution archdeacons had no relation to the diocese. They were chosen by the bishop to have the charge of the deacons, who are the lowest order in the church. By degrees this office became universal, and they began to share with the bishop in his authority. Their proper business was to attend the bishop at the altar, to direct the deacons and other inferior officers in their several duties, for the due performance of divine service. They attended the bishop at ordinations, and assisted him in managing the revenues of the church; but did not possess any of that jurisdiction either in the cathedral or the diocese, with which they are now invested. The council of Laodicea, in the year 360, ordained that no bishops should be placed in country villages, but only itinerant or visiting presbyters. The archdeacon being always near to the bishop, was frequently employed by him in visiting the clergy of his diocese, and in the despatch of other matters relating to the episcopal cure; so that, by the beginning of the seventh century, the archdeacon seems to have been fully possessed of the chief care and inspection of the diocese, in subordination to the bishop. The canon law styles the archdeacon *the bishop's eye*. In the bishop's absence he has power to hold visitations, and, under the bishop, power to examine candidates for holy orders. He also gives institution and induction to benefices. He excommunicates, imposes penances, suspends, corrects, inspects and reforms irregularities and abuses among the clergy. He has the charge of the parochial churches within the diocese. In short, he supplies the bishop's absence, and is his viceregent.

The institution of deaneries is something analogous to the division of the civil government into hundreds, tithings, and frank pledges. Bearing some resemblance to this, every bishop divided his diocese into deaneries, each of which contained a district of ten parish churches. Over every such deanery, or *decanery*, the bishop appointed a dean. In England there are four sorts of deans and deaneries. The first is a dean who has a chapter consisting of prebendaries or canons subordinate to the bishop. The dean and his chapter are the bishop's councillors both in the spiritual and temporal affairs of his diocese. This council became necessary after the subdivision of parishes, when the whole body of his clergy were dispersed throughout his diocese. This council was instituted to assist the bishop, that the burden of the whole church and its government might not lie entirely on the bishop's shoulders. The second is a dean without a chapter. He is *representative*, and has cure of souls. He has a court, and holds jurisdiction, but is not subject to the bishop's visitation. The third dean is also ecclesiastical. His deanery is *donative*, but he has no cure of souls. He has a court, and holds plea and jurisdiction within his peculiar, of all ecclesiastical matters and things. The fourth are the *rural deans*. They have no absolute judicial power, but are to order the ecclesiastical affairs within their deanery and precinct under the bishop's or archdeacon's directions, and in many cases act as the bishop's substitutes. All the ancient deans were elected by the chapter, by *conge d'elire* from the king, accompanied by letters missive

of recommendation, in the same manner as the bishops. Those which have been erected since the Reformation are donative, and possession is given by letters patent from the crown.

After the bishops dispersed the body of their clergy to the care of parochial churches, they reserved a college of priests for counsel and assistance to themselves, and for the constant celebration of divine service at the cathedral church of the diocese. Among these the tenth person had an inspecting or presiding power, till in time the dean swallowed up the office of all the inferior, and in subordination to the bishop became governor of the whole society. The dean had authority over all the canons, presbyters, and vicars. He gave them possession when instituted by the bishop. He inspected their discharge of the cure of souls. He convened and presided in chapters, and heard and determined causes. He visited all churches within the limits of his jurisdiction once in three years. Men of this dignity were called *archipresbyters*, because they had a superintendence or primacy over all their college of priests. The title of dean is a title of dignity. The canons require deans to reside at their cathedral churches fourscore and ten days at the least, *conjunctim* or *divisim*, in every year at least. And while there he is to preach the word of God, and keep good hospitality, unless he is otherwise hindered by good and weighty reasons known to, and allowed by, the bishop. A dean and chapter is a body corporate spiritual. They were originally selected by the bishop as his council, but they derive their corporate capacity from the crown. By degrees their dependance on and relation to the bishop gradually diminished, till at last the bishop has little more power left to him than that of visiting them, and he scarcely nominates the one half of them.\*

III. An archdeacon has an ecclesiastical jurisdiction immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself, and has an authority which was originally derived from the bishop, but is now independent and distinct from his.† He therefore visits the clergy, and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

IV. Rural deans are very ancient officers in the church, but are now almost grown out of use, though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been the bishop's deputies, planted all round his diocese, for the better inspection of the parochial clergy, to inquire into and report dilapidations, and to examine candidates for confirmation, and were armed in ministerial matters with an inferior degree of judicial and coercive authority.

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches. In treating of whom it will be necessary to mark out the distinction between them; to observe the method by which one may become a parson or vicar; briefly notice their rights and duties; and lastly, show how one may cease to be either. §

A parson, *persona ecclesiæ*, is one that has full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church is represented; and he is himself a corporation sole, in order to defend and protect the rights of the church which he personates by a perpetual succession. He is sometimes called the rector or governor of the church; but the appellation of parson (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, and most honourable title that a parish priest can enjoy; because, says Sir Edward Coke, such a one, and he only, is said, *vicem seu personam ecclesiæ gerere*. A parson has during his life the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living, which the law esteems equally capable of providing for the service of the church as any single private gentleman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient

\* Burns' Eccl. Law.

† Ibid.

§ Blackstone's Commentary, Christian's Edition.

in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes were distributed between the bishop and the incumbent. But when the bishops' sees became otherwise endowed, the bishops were prohibited from demanding their usual share of the tithes, and hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest, and that the principal part of the tithes should be appropriated to the use of their fraternities, subject to the burden of repairing the church and providing for its constant supply; the endowment of which was construed to be a work of the most exalted piety. And therefore they begged, and bought for masses and obits and sometimes for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporations. But it was necessary, in order to complete such appropriation effectually, to obtain the king's license and the bishop's consent; because some time or other either the king or the bishop might have an interest by lapse in the presentation to the benefice, which can never happen if it be appropriated to the use of a corporation, which never dies; and also because the law reposes a confidence in them, that they will not consent to anything prejudicial to the interests of the church. The patron's consent is also necessarily implied; because, as was before observed, appropriation can be originally made to none, but to such spiritual corporation as is also the patron of the church. The whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the church. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church, and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.

This appropriation may be severed, and the church become disappropriate, two ways: as first, if the patron or appropriator presents a clerk, who is instituted or inducted to the parsonage; for the incumbent to be instituted and inducted, is to all intents and purposes a complete parson; and the appropriation, being once severed, can never again be reunited, unless by a repetition of the same solemnities. And when the clerk so presented is distinct from the vicar, the rectory, thus vested in him, becomes what is called a *sinécure*; because he has no cure of souls, having a vicar under him to whom that cure is committed. Professor Christian is of opinion, that the appropriator cannot create a *sinécure* rector. But if he should either by design or mistake present his clerk to the parsonage, it is held that the vicarage will ever afterwards be dissolved, and the incumbent will be entitled to all the tithes and dues of the church as rector. Wherever a rector and vicar are presented and instituted to the same benefice, the rector is excused all duty, and has what is properly called a *sinécure*. But where there is only one incumbent, the benefice is not in law a *sinécure*, though there should be neither a church nor any inhabitants within the parish. Also if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law, because the perpetuity of person is gone, which is necessary to support the appropriation.

In this manner were most, if not all of the appropriations at present existing, originally made; being annexed to bishoprics, prebends, religious houses, nay even to nunneries and certain military orders, all of which were spiritual corporations. And although, subject to the same conditions, appropriations may be made at the present day, yet it surely may be questioned whether such a power any longer exists. It cannot be supposed that at this day, the inhabitants of a parish, who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might perhaps be perfect strangers. Appropriations are said to have originated from an opinion eagerly inculcated by the monks, that tithes and oblations, though payable to some church, yet were an arbitrary donation, which might be given, as a reward for religious services to any person from whom he received those services. Till the monks got complete possession of the revenues of the church, they spared no pains to recommend themselves as the most deserving objects of the gratitude and benefaction of the parish.\* There probably have been no new appropriations, since the dissolution of the

\* Burns' Ecc. Law.



monasteries by Henry VIII.\* At which time the appropriations of the several parsonages which belonged to those respective religious houses (amounting to more than one-third of all the parishes in England) would have been by the rules of the common law disappropriated, had not a clause in these statutes intervened to give them to the king in as ample a manner as the abbots, &c., formerly held the same at the time of their dissolution. Although this was far from being defensible, it was not without a precedent. The same thing was done in former reigns, when the alien priories, that is, such as were filled by foreigners only, were dissolved and given to the crown. From these two roots have sprung all the lay appropriations of secular parsonages which we now see in the kingdom. Having been granted out after the Reformation by the crown; and Sir Henry Spelman says, "these are now called impropriations, as being improperly in the hands of laymen."

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes in which the society or corporation was the parson. This officiating minister was in reality no more than a curate, deputy, or viceregent of the appropriator, and therefore was called *vicarius* or vicar. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody to be responsible to him for the temporalities, and to the bishop for the spiritualities.† But this was done in so scandalous a manner, and the parishes suffered so much by the appropriators' (that is the monks') neglect, that the legislature was forced to interpose. Accordingly it was enacted,‡ that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms which had formerly been collected for the poor; and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But being liable to removal at the pleasure of the appropriator, he was not likely to insist too rigidly on the legal sufficiency of the stipend; and therefore by a later statute§ it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, and not removable at the caprice of the monastery; that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the bishop for these three express purposes: "to do divine service, to teach the people, and to keep hospitality." The endowments in consequence of these statutes, have usually been by a portion of the glebe or land belonging to the parsonage, and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are therefore generally called *privy* or *small tithes*, the greater or *prædial tithes* being still reserved to their own use.¶ But one and the same rule was not observed in the endowment of all vicarages: hence some are more liberally, and some more scantily endowed; and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in others are vicarial tithes.

From this act we may date the establishment of vicarages.¶ Before this time the vicar in general was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the regular clergy. The monks, who lived *secundum regulas*, that is, according to the rules of their respective houses or societies, were denominated *regular clergy*, in contradistinction to the parochial clergy, who performed their ministry in the world, in *seculo*, and who from thence were called *secular clergy*. All the tithes or dues of the church, of right belonged to the rector, or to the appropriator or impropiator, who have the same rights as the rector; and the vicar is only entitled to that portion which is expressed in his endowment, or what his predecessors have enjoyed by immemorial prescription, which is equivalent to a grant or endowment. And where there is an endowment, he may in general recover all that is contained in it; and he may still retain what he and his predecessors have enjoyed by prescription, though not expressed in it; for such a prescription amounts to evidence of another

\* 27 and 31 Henry VIII.  
§ Henry IV., c. 1.

† Selden on Tithes.  
¶ See article Tithes.

‡ 15 Richard II., c. 6.  
¶ Henry IV.

consistent endowment. Lord Eldon has declared, that if a vicar enjoys property not mentioned in an endowment, and has never within the time of memory possessed what is expressly contained in it, a jury might presume that he had the former in lieu of the latter. These endowments frequently invest the vicar with some part of the great tithes; therefore the words rectorial and vicarial tithes have no definite signification. But great and small tithes are technical terms, and which are, or ought to be, accurately defined and distinguished by the law.

The distinction, therefore, of a parson and a vicar is this. The parson has, for the most part, the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. At the dissolution of the monasteries, all these appropriations were transferred to the crown, and were by the king granted out to different families, and are now called impropriations. In some appropriated churches, no perpetual vicar has ever been endowed; in which case the officiating minister is appointed by the appropriator and is called a perpetual curate. In some places the vicarage has been considerably augmented by a large share of the parochial tithes, and was greatly assisted by the statute 29 Charles II., enacted in favour of poor vicars and curates, which rendered such temporary augmentations as were made by the appropriators perpetual.

The method of becoming a parson or vicar is much the same. To both four requisites are equally necessary: holy orders, presentation, institution, and induction.\* By common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage. It was ordained in the reign of Elizabeth, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived. Now by statute† no person is capable of being admitted to any benefice, unless he has been first ordained a priest, and then in the language of the law he is a clerk in orders; and he cannot take the order of priesthood till he be full four and twenty years of age. But if he obtain orders, by money or corrupt practices, (which seems to be the true, though not the common notion of simony,) the person giving such orders forfeits L.40, and the person receiving, L.10, and is incapable of any ecclesiastical preferment for seven years afterwards.

Any clerk may be presented to a parsonage or vicarage, so may also a layman, but he must take priest's orders before his admission:‡ that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. But when a clerk is presented, the bishop may refuse him on many accounts: as, 1. If the patron is excommunicated, and remains in contempt forty days. Or, 2. If the clerk be unfit, which unfitness is of several kinds. First, with regard to his person; as if he be a bastard, an outlaw, an excommunicate, an alien, under age, and the like. Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*. If the bishop alleges only in generals, as that he is an inveterate schismatic, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, then the bishop must give notice to the patron of such cause of refusal, who, being usually a layman, is not supposed to have knowledge of it, else he cannot present by lapse; but if the cause be temporal, then he is not bound to give notice.

If a patron brings an action at law against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted, the judges of the king's court must determine its validity, or whether it be a sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as heresy,) the fact, if denied, shall also be determined by a jury. If the fact be admitted or found, the court upon consultation and advice of learned divines shall

\* See Art. United Church of England and Ireland, post.

† 13 and 14 Charles II., c. 4.

‡ Burns' Ecc. Law.

decide its sufficiency. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient, because the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk to be unfit: therefore if the bishop returns the clerk as deficient in literature, the court shall write to the metropolitan to re-examine him, and certify his qualifications; and the archbishop's certificate is final.

If the bishop makes no objections, but admits the patron's presentation, the clerk so admitted, is next to be instituted, which is a kind of investiture of the spiritual part of the benefice; for by institution, the care of the souls of the parish is committed to the clerk's charge. At his institution, the vicar, if required by the bishop, took an oath of perpetual residence; but this is not now required. When the bishop is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till a new vacancy, at least in the case of a common patron; but the church is not full against the king till induction. Nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk. Upon institution also, the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till after induction. And when a clerk is presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson impersonae.

A parson or vicar's right to the tithes and ecclesiastical dues, will be described under the head of tithes. The duties laid on him by statute are so numerous, that they cannot be recited here. I shall only mention the article of residence, on the supposition of which the law styles every parochial minister an incumbent. A clergyman willingly absenting himself from his benefice for one month together, or for two months in the year, incurs a penalty of five pounds: ill health, or inevitable absence, is however an exception to the penalties. The bishop, in his court, may compel the residence of all clergy who have the cure of souls within his diocese. This extends to all archdeaconries, deaneries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which residence is required, must reside upon one or the other. Chaplains to the king or others, are however exempted during their attendance in the household; and also all heads of houses, magistrates, and professors in the universities, and all students under thirty years of age, residing there *bona fide* for study. The king can give a license to his chaplains for nonresidence, even whilst they do not attend his household; but noblemen's chaplains are only excused during their actual attendance on their lords or ladies. Legal residence is not only in the parish, but also in the parsonage house, if there be one; for it has been resolved that residence is intended not only for serving the cure and for hospitality, but also for maintaining the house, that the successor may also keep hospitality there. And if there be no parsonage house, then the incumbent is bound to hire one, in the same or some neighbouring parish. An act of parliament\* provides for raising money on ecclesiastical benefices, to be paid off annually by decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices. This act enables the incumbent, when there is no parsonage house, or where it is so ruinous as not to be repaired with one year's income of the living, to borrow, with the consent of the patron and bishop, upon mortgage of the living, a sum not exceeding two years' clear value, to be laid out in repairs, building, or the purchase of a house.

We have seen that there is but one way of becoming a parson or vicar; but there are many ways of ceasing to be one. 1. By death. 2. By cession, in taking another benefice; for by statute\* if any one having a benefice of L.8 per annum, or upwards, according to the present valuation in the king's books, accepts any other, the first shall be adjudged void, unless he obtains a dispensation, which none is entitled to have but the king's chaplain, and

\* 17 Geo. III., c. 53.

others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law admitted by the universities; and a vacancy thus made for want of a dispensation is called a cession. In the case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases; but there is great reason to think, that lapse will not incur from the time of institution against the patron, unless notice be given him; but lapse will incur from the time of induction without notice. 3. By consecration; for, as was before mentioned, when a clerk is promoted to a bishopric, all his other preferments are void from the moment of his consecration. But there is a method by the favour of the crown, of holding such living in *commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary, for one, two, or three years, or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. These commendams are now seldom or never granted to any but bishops, and in that case the bishop is made commendatory of the benefice, while he continues bishop of such a diocese only, as the object is to make it an addition to a small bishopric. It would be unreasonable to grant it to a bishop for his life, who might afterwards be translated to one of the richest sees. There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clergyman. 4. By resignation. This is of no avail, till accepted by the bishop, into whose hands the resignation must be made. But it seems to be clear, that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal. Whether he can, merely at his will and pleasure, refuse to accept a resignation, without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. 5. By deprivation. Either, first, by sentence declaratory in the ecclesiastical court, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony, or conviction of other infamous crimes in the king's courts: for heresy, infidelity, gross immorality, and such like. Or, secondly, in pursuance of divers penal statutes, which declare the benefice void; for some nonfeasance or neglect, or else some malfeasance or crime; as, for simony, for maintaining any doctrine derogatory of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer. For neglecting after institution to read the liturgy and articles in the church, or to make the declarations against popery, or take the abjuration oath. For using any other form of prayer than the liturgy of the church of England; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities. In all which and similar cases, the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A curate, though in full priest's orders, is the lowest degree in the church. He is in the same state that a vicar formerly was, an officiating temporary minister, instead of the proper incumbent. There are also what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, but instead the perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy, shall be paid such stipend as the bishop thinks reasonable, out of the profits of the vacancy. If that be not sufficient, by the successor, within fourteen days after he takes possession. Likewise, if any rector or vicar nominates a curate to the bishop for license to serve the cure in his absence, the bishop shall settle his stipend under his hand and seal, not exceeding £50 per annum, nor less than £20; and on failure of payment may sequester the profits of the benefice.

The act of George III. has made such considerable alterations in the law respecting curates, that it may be proper to repeat some of its provisions.

When any person becomes incumbent of a benefice, and does not reside upon it, (unless he has a legal exemption from residence, or a license to reside out of the parish, or the house

of residence), the bishop shall appoint a salary to the licensed curate, not less than L.80 per annum, or the annual value of the benefice, if the gross value does not amount to that sum; nor less than L.100 per annum, or the whole value, if the gross value does not amount to L.100 per annum, and the population amounts to or exceeds 300; nor less than L.120 per annum, or the whole value where the gross value does not amount to L.120 per annum, and the population amounts to or exceeds 500; nor less than L.150 per annum, or the whole value as above, if it does not amount to L.150 per annum, and the population amounts to or exceeds 1000. Where the actual annual value of any benefice exceeds L.400, the bishop may assign L.100 per annum to the curate, though the population do not amount to 300; and where the income exceeds L.400, and the population does not amount to, or exceed 500, a farther provision of L.50 per annum. In all cases of nonresidence from sickness, age, or other unavoidable causes, the bishop may fix smaller salaries at his discretion. The salary of a curate who serves interchangeably with his incumbent at different benefices belonging to the same incumbent, shall not exceed that allowed under the act for the largest of these benefices, nor be less for that of the smallest. All contracts between incumbents and curates in fraud or derogation of this act are void *ab initio*. Where the curate's salary is equal to the gross value of the benefice, it is to be subject to all deductions, for charges and outgoings legally affecting it, and to any loss or diminution of it not arising from default of the incumbent. And in all such cases the incumbent may deduct any sum expended in repairing the chancel, or house of residence with its appurtenances, and not exceeding one-fourth of the salary. When the incumbent is nonresident for four months in the year, the bishop may allot the house of residence to the curate during the time he shall serve the cure, or during the incumbent's nonresidence. Or if the curate be assigned a salary not less than the gross annual value of the benefice, and lives in the house of residence, he shall then pay all the taxes and parish assessments of the house during his residence. On three months' notice from the bishop, the curate must deliver up possession of the house of residence to the incumbent, under a penalty of 40s. for each day of wrongful possession; and in the event of a vacancy, he is to quit the same within three months after the appointment of the new incumbent, on his requiring him so to do, with one month's notice to quit. Lastly, whenever the ecclesiastical duties of a benefice are inadequately performed, or the incumbent neglects to appoint a curate during his nonresidence, the bishop is empowered to license and appoint a curate with a salary.

VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish. They are sometimes appointed by the minister, sometimes by the parish, and sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at common law; but there is no method of calling them to account, but by first removing them; for none but their successors can legally do it. As to lands or other real property, as the church, churchyard, &c., they have no sort of interest therein: but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose; but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy a shilling forfeiture on all such as do not repair to church on Sundays and holydays; and are empowered to keep all persons orderly while there. To which end it has been held, that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass. There are also a multitude of other petty parochial powers committed to their charge by several acts of parliament.

Parish clerks and sextons are also regarded by the common law as persons who have freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived, by ecclesiastical censures. Formerly the parish clerk was frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's

bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.\*

## RELATIONS IN PRIVATE LIFE.

THE principal relations in private life consist of, I. Husband and wife; II. Parent and child; III. Guardian and ward; IV. Master and servant.

I. HUSBAND AND WIFE.—That the holy estate of matrimony was instituted by God himself, is evident from the two first chapters in the Bible. Man was created on the sixth day in the image of God; or as the apostle explains these words, in “righteousness and true holiness,”† and “renewed in knowledge, after the image of him that created him.”‡ Immediately after the creation, and as it would appear, on the same day, God who alone could confer it, gave him dominion over every living creature, and over all the earth, commanding him to subdue it, and to increase and multiply in it. But for Adam there was not a help, meet for him. God took one of Adam’s ribs and made of it a woman, which is an evident token of her natural dependance and subjection to him. Her Creator brought her unto Adam, a just precedent for the universal practice of the woman’s father or nearest of kin giving her away. It is also another symptom of her natural inferiority. On this occasion Adam exercised his right of sovereignty, by naming her both Eve and *woman*, because she was bone of his bone, and flesh of his flesh. In virtue of his universal dominion and sovereignty, he enacted that statute, which has ever since been recognized and obeyed in all countries both civilized and barbarous: “Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh.”§ This statute was confirmed by our blessed Lord, repeating the identical words.|| After the unfortunate transaction between Eve and the serpent, the Almighty again renewed Adam’s charter. “Unto the woman he said, I will greatly multiply thy sorrow and thy conception: in sorrow thou shalt bring forth children, and thy desire shall be to thy husband, *and he shall rule over thee.*” This divine institution has accordingly been observed in every country, and in every country there has been some religious way of entering into this holy estate. The church of Scotland acknowledges that “marriage was ordained for the mutual help of husband and wife; for the increase of mankind with a legitimate issue, and of the church with an holy seed; and for preventing of uncleanness.”¶ And the church of

\* Blackstone’s Commentaries, with Professor Christian’s Notes.—Burns’ Ecclesiastical Law.—Gibson’s Codex.—Tomline’s Law Dict.—Bell’s ditto.

† Eph. iv. 24. ‡ Col. iii. 10. § Gen. ii. 24. || Matth. xix. 5. Mark x. 7.

¶ Confession of Faith, xxiv. sec. 2. Eph. v. 31.

England says it "is an honourable estate, instituted of God in the time of man's innocency, signifying unto us the mystical union that is betwixt Christ and his church: which holy estate Christ adorned and beautified with his presence and first miracle that he wrought in Cana of Galilee; and is commended of St Paul to be honourable among all men; and therefore is not by any to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly, to satisfy men's carnal lusts and appetites, like brute beasts that have no understanding; but reverently, discreetly, advisedly, soberly, and in the fear of God; duly considering the causes for which matrimony was ordained. *First*, It was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy name. *Secondly*, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body. *Thirdly*, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.\* "Marriage," says the apostle, "is honourable in all, and the bed undefiled; but whoremongers and adulterers God will judge."† Eve received her life from Adam, as the church did from Christ. She was taken out of Adam's side when he was in a deep sleep. After Christ was dead, the sacraments of *water* and *blood* flowed out of his side, that is, baptism, whereby we are born again unto Christ, and the sacrament of his blood, whereby we are nourished unto eternal life. "What therefore God hath joined together, let not man put asunder."‡ "Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband. Let the husband render unto the wife due benevolence; and likewise also the wife unto the husband. The wife hath not power of her own body, but the husband: and likewise also the husband hath not power of his own body, but the wife."§ "And unto the married I command, yet not I, but the Lord, let not the wife depart from her husband; but, and if she depart, let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife. But to the rest speak I, not the Lord: if any brother hath a wife that believeth not, and she be pleased to dwell with him, let him not put her away. And the woman that hath an husband that believeth not, and if he be pleased to dwell with her, let her not leave him. For the unbelieving husband is sanctified by the wife, and the unbelieving wife is sanctified by the husband, else were your children unclean: but now are they holy. But if the unbelieving depart, let him depart. A brother or a sister is not under bondage in such cases: but

\* The Form of Solemnization of Marriage, Book of Common Prayer.

† Heb. xiii. 4.

‡ Mark x. 9.

§ 1 Cor. vii. 2—4.

God hath called us to peace. For what knowest thou, O wife, whether thou shalt save thy husband, or how knowest thou, O man, whether thou shalt save thy wife.\* “ *Wives submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church, and he is the Saviour of the body. Therefore as the church is subject unto Christ, so let the wives be to their own husbands in everything. Husbands love your wives, even as Christ also loved the church, and gave himself for it; that he might sanctify and cleanse it with the washing of water by the word; that he might present it unto himself a glorious church, not having spot, or wrinkle, or any such thing; but that it should be holy, and without blemish. So ought men to love their wives as their own bodies: he that loveth his wife loveth himself. For no man ever yet hated his own flesh; but nourisheth and cherisheth it, even as the Lord the church: for we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery: but I speak concerning Christ and the church. Nevertheless, let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband.*† “ The wife is bound by the law as long as her husband liveth; but if her husband be dead, she is at liberty to be married to whom she will; only in the Lord. But she is happier if she so abide, after my judgment: and I think also that I have the Spirit of God.”‡

In what follows, I shall in the first place inquire how marriage may be contracted or made; and shall next point out the manner in which it may be dissolved; and, lastly, shall take a view of the legal effects and consequences of marriage.

I. Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law. And taking it in this civil light, the law treats it as it does all other contracts. It allows it to be good and valid in all cases, where the parties, at the time of making it, were, in the first place, *willing* to contract; secondly, *able* to contract; and lastly, *actually did* contract, in the proper forms and solemnities required by law.

All persons in general are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. And what those are, I shall now point out.

These disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but in law these only make the marriage voidable, and

\* 1 Cor. vii. 10—16.

† Eph. v. 22—33.

‡ 1 Cor. vii. 39, 40.



not *ipso facto* void, until sentence of nullity be pronounced. In order to a regular marriage in England, the banns must first be published during divine service by the minister of the parish or parishes where the parties dwell. Whoever has any objection against a marriage must make application to the bishop, who, if he see cause, may send an *inhibition* to the parish minister, forbidding him to proceed. But if no such inhibition be sent, the minister may marry them at any lawful time or place. At the time of marriage, however, when the minister pronounces these words: "If any one know any just cause or impediment why these parties should not be joined together in holy matrimony, ye are to declare, or else for ever hold your peace." Then the rubric directs, that if any one "declare any objection or impediment, and give security to the persons to be married, to the full damages they will sustain by not being married, that he shall prove his allegation," &c, then the marriage shall be deferred till the cause be determined, or the parties agreed.

Lawful impediments are three. 1. *Precontract*, when one or both parties are before married, or are pre-engaged to another person by a solemn mutual promise made in the presence of witnesses, and a suit is hereupon commenced in some ecclesiastical court. If satisfactorily proved, precontract dissolves marriage with any other person, even though it may have been consummated; by statute 2 Edw. VI. 2. *Affinity or consanguinity*. To know who are too near of kin to marry together, the following table of degrees, set forth by authority in 1563, will sufficiently demonstrate.

A TABLE OF KINDRED AND AFFINITY, wherein whosoever are related in Scripture, and by our Laws, to marry together.

*A Man may not marry his*

- 1 Grandmother.
- 2 Grandfather's Wife.
- 3 Wife's Grandmother.
- 4 Father's Sister.
- 5 Mother's Sister.
- 6 Father's Brother's Wife.
- 7 Mother's Brother's Wife.
- 8 Wife's Father's Sister.
- 9 Wife's Mother's Sister.
- 10 Mother.
- 11 Stepmother.
- 12 Wife's Mother.
- 13 Daughter.
- 14 Wife's Daughter.
- 15 Son's Wife.
- 16 Sister.
- 17 Wife's Sister.
- 18 Brother's Wife.
- 19 Son's Daughter.

*A Woman may not marry with her*

- 1 Grandfather.
- 2 Grandmother's Husband.
- 3 Husband's Grandfather.
- 4 Father's Brother.
- 5 Mother's Brother.
- 6 Father's Sister's Husband.
- 7 Mother's Sister's Husband.
- 8 Husband's Father's Brother.
- 9 Husband's Mother's Brother.
- 10 Father.
- 11 Stepfather.
- 12 Husband's Father.
- 13 Son.
- 14 Husband's Son.
- 15 Daughter's Husband.
- 16 Brother.
- 17 Husband's Brother.
- 18 Sister's Husband.
- 19 Son's Son.

*A Man may not marry his*

- 20 Daughter's Daughter.
- 21 Son's Son's Wife.
- 22 Daughter's Son's Wife.
- 23 Wife's Son's Daughter.
- 24 Wife's Daughter's Daughter.
- 25 Brother's Daughter.
- 26 Sister's Daughter.
- 27 Brother's Son's Wife.
- 28 Sister's Son's Wife.
- 29 Wife's Brother's Daughter.
- 30 Wife's Sister's Daughter.

*A Woman may not marry with her*

- 20 Daughter's Son.
- 21 Son's Daughter's Husband.
- 22 Daughter's Daughter's Husband.
- 23 Husband's Son's Son.
- 24 Husband's Daughter's Son.
- 25 Brother's Son.
- 26 Sister's Son.
- 27 Brother's Daughter's Husband.
- 28 Sister's Daughter's Husband.
- 29 Husband's Brother's Son.
- 30 Husband's Sister's Son.

In the course of nature it is scarcely possible that any one should ever marry his issue in the fourth degree. Between collaterals, all who are in the fourth, or any collateral degree, are permitted to marry. A husband is related to all the *consanguinei* of his wife, and *vice versa*, the wife to those of her husband. The husband and wife being considered as one flesh, those who are related to the one by blood, are related to the other by affinity.\* Therefore; after his wife's death, a man cannot marry her sister, aunt, or niece. But the relations by affinity of the husband are not at all related to those of the wife. Two brothers therefore may marry two sisters, or a father and son may marry a mother and her daughter.

3. Some particular corporeal infirmities, also, disable parties from marriage. But such marriages not being void *ab initio*, but only voidable by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties.

4. Another legal disability is want of age in either or both of the contracting parties. This is sufficient to set aside all other contracts, on account of the imbecility of judgment in the contracting parties; *a fortiori*, therefore it ought to avoid this, the most important contract of any. 5. Want of the consent of parents or guardians is also a legal incapacity, if either of the parties be under twenty-one years of age. The church and the state both combine to punish the clergyman who should marry, after banns being published, any parties under that age, without having the express consent of parents or guardians. By the sixty-second canon of the church of England, the bishop is authorized to suspend him from officiating for three years. And by several acts of parliament, penalties of one hundred pounds are laid on any clergyman who marries a couple either without publication of banns, (which are intended to give notice to parents and

\* Gibson's Codex.

guardians,) or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 26 Geo. II. it is enacted that all marriages celebrated by license, (for banns suppose notice,) where either of the parties is under twenty-one, (and not being a widow or widower, who are supposed to be emancipated from paternal control,) without the father's consent, or, if he be not living, of the mother, or guardian, shall be absolutely void.

5. Want of reason is a most powerful incapacity, for without a competent share of it, as no other, so neither can the matrimonial contract be valid, idiots or people without due reason being always considered as minors, and therefore taken under the special protection of the law. And it is provided by act of parliament, 15 Geo. II., that the marriage of lunatics and persons under frenzies, (if declared lunatics under a commission, or committed to the care of trustees by any act of parliament,) before they are pronounced to be of sound mind by the lord chancellor or the majority of such trustees, shall be totally void. Lastly, the parties must not only be willing and able to contract, but must actually contract themselves in due form of law, to make it a good civil marriage. In England no marriage is at present valid, unless it be celebrated in some parish church or public chapel, except a dispensation be procured from the archbishop of Canterbury. It must also be preceded either by the publication of the banns by the parish minister in the middle of the public service in the forenoon, or by license from the spiritual judge. And it is also indispensable, that the marriage ceremony be performed by a person in holy orders.

As the law now stands, therefore, we may upon the whole collect, that, by the temporal law, no marriage is *ipso facto* void, that is celebrated by a person in holy orders,—in a parish church or public chapel, or elsewhere by a special dispensation,—in pursuance of banns or a license—between single persons,—consenting,—of sound mind,—and of the age of twenty-one years. And no marriage is voidable, that is, can be dissolved by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of precontract, (if that still exists)—of consanguinity, or relation by blood—of affinity or relation by marriage—or coporeal imbecility, if it subsisted *previous* to the marriage.\*

The Confession of Faith of the church of Scotland, chap. xxiv. sec. 4, says, “Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the word; nor can such incestuous marriages ever be made lawful by any law of men, or consent of parties, so as those persons may live together as man and wife. The man may not marry one of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer of blood than her own.”

\* Blackstone's Commentaries.

Cousins-german are not forbid to marry by any law of God or man, except the pope's canon law, which is happily not now in force as to this particular, being for ever broken up by the 32 of Henry VIII. And if cousins-german are not prohibited, then they who are more remotely related cannot be under any restraint, notwithstanding that by the same popish canon law, not only real relations were prohibited from contracting marriage, but also *imaginary* ones. For instance, according to the absurd canons of the papists, any man and woman that had stood as sureties for the same child, or had at its baptism laid their hands on it, in order to take it out of the font when it was dipped, if such were the custom, were prohibited from marrying together. Nay, to such an extreme did papists carry this absurdity, that the prohibition extended to the person who baptized, to his sons and daughters, and to the father and mother of the person who was baptized. For by popish casuistry it was pretended that by this means a *spiritual* affinity was contracted. Very little regard is to be paid to this popish law, and by none other is the marriage of cousins-german prohibited. It will be remembered in the interesting story of Tobit, in the apocryphal part of the Bible, that the angel which accompanied his son Tobias, said to him, "Brother, to-day we shall lodge with Raguel, who is thy cousin: he also hath one only daughter, named Sara. I will speak for her, that she may be given thee for a wife: for to thee doth the right of her appertain, seeing thou only art of her kindred; and the maid is fair and wise. Now, therefore, hear me, and I will speak to her father; and when we return from Rages, we will celebrate the marriage: for I know that Raguel *cannot* marry her unto another according to the law of Moses,\* but he shall be guilty of death, because the right of inheritance doth rather appertain unto thee than to any other."†

Before any can be lawfully married in England, the banns are directed to be published on three several Sundays. This care of the church to prevent clandestine marriages, is as old as Christianity itself. Tertullian tells us, that in his time all marriages were accounted clandestine that were not published beforehand in the church. The design of these banns is, that the church may be satisfied that there is no lawful impediment why the parties may not be joined together in matrimony. Some parish officers have presumed to forbid banns, because the parties have been poor, and therefore likely to create a charge to the parish; or because the man has not been an inhabitant, according to the laws made for the settlement of the poor. But no person has authority to forbid the minister to proceed in publishing the banns, but the bishop only. If indeed the minister is satisfied that any of the before mentioned impediments

\* Numb. xxvii. 8, xxxvi.

† Tobit vi. 10, 11, 12.

exist, he ought in reason to forbear publication. If he proceed, under this knowledge, to marry the parties, he is liable to censure, if his knowledge of the impediment can be proved. But the minister is not at liberty to stop his proceeding, because any captious or malicious person, without just reason or authority, takes upon him to forbid him. Poverty is no more an impediment to marriage than riches. The kingdom can no more subsist without the poor than without the rich. And there can be no reason to doubt, but that banns may be published, and marriage solemnized, betwixt two persons that reside or sojourn within a parish, though they be not fixed inhabitants. For such persons, though strangers to the rest of the parish, are parishioners as to the minister; who is to visit them if they are sick, to give them the sacraments while living, and bury them when dead. And on their part, they are to perform the duty of parishioners to him; that is, to pay tithes and offerings, if there are any to be demanded. They are parishioners in all respects, except only, that if they fall into poverty, they do not enjoy the benefits of the poor laws. Neither does the law say, that any man is made liable to be kept by a parish, because he was married in it by banns: nor does it appear that these temporal laws, relating to the poor, were intended to alter the laws of the church, which both by custom and canon has all along permitted and required persons to have the banns published, and the marriage celebrated, where the parties dwell, *or are commorant*. And the rubric before the office of matrimony is to the same purpose: "if they dwell in diverse parishes,"—" *si incolunt in diversis paræciis*," says the old Latin translation; " *si vivunt*," says the new; but in publishing the banns, the minister may cautiously say, " *N of this parish sojourner*."

Some clergymen have been summoned and corrected in the spiritual courts for solemnizing marriages in churches where the banns were not asked, and to which the parties married did not belong as parishioners; although they had a certificate of the banns being published, under the hand of the minister or ministers to whose parishes they belonged. This was forbid by ancient canons, as well as by the sixty-second canon of the church of England. The license of the curate, however, to whose parish the parties belonged, was sufficient; at same time the curate must do more than certify the publication of banns; he must expressly, under his hand, give the parties leave to be married in another parish church, and also to the curate of that other church to marry them. And indeed, by the constitution of archbishop Peckham, the curate of any parish may license his parishioners to communicate in another parish church.

By both ancient and modern canons, it was well provided that marriages should be celebrated *in facie ecclesiæ*, in the face of the church, that is, in time of divine service; but this practice is, as if by universal consent,

laid aside. Yet in matrimonial cases tried before the consistory court, the judge asks whether, during the time the marriage in question was solemnized, the church doors were open. It was an ancient and very good custom, and which still generally prevails in England, that marriages should not be celebrated in any other church than that to which the woman belongs as a parishioner; and therefore the ecclesiastical law allows a fee to the clergyman of that church, whether she be married there or not. And this fee was expressly reserved for him by the words of the license, according to the old form; but it is said that this has been refused in the temporal courts, because it is generally claimed by virtue of the canon law, which is now abrogated; whereas, were it demanded as due by prescription, or immemorial custom, within such a parish or diocese, it is reasonable to suppose that the temporal courts would allow of this plea; for custom is common law.

The canons of the church of England do not allow any marriages to be celebrated in private houses, but only in the parish church, and that too only between the hours of eight and twelve in the forenoon. In Scotland marriages take place almost invariably in private houses, and at any hour of the day. The church of England allows none but a lawful minister to tie the bonds of matrimony. Because marriage is the bond and foundation of all society, and it ought therefore to be made sacred, and adopted into religion, it being the interest of mankind that it should be kept inviolable. Above all, because God himself married the first man and woman, and blessed them, and made a covenant with them; and the lawful minister is God's representative or ambassador, to take securities, and bless the parties in God's name. The church allows of no clandestine marriages, and for the better security against such, she orders that all marriages shall be celebrated in the daytime, for those who mean honestly and honourably need not be ashamed and fly the light. And because most people are more serious in the morning, it is appointed by the sixty-second canon that all marriages shall, as already noticed, be solemnized between the hours of eight and twelve; and formerly it was required that the bride and bridegroom should both be fasting when they made this religious vow in the presence of God, by which means they were preserved from being incapacitated by drink from making a wise and voluntary choice. And that this rite might be still more solemn, it is expressly required in England that all marriages be celebrated in the church, the place of God's especial presence, before whom they make this religious covenant at his holy altar. It is also enjoined to be celebrated in the presence of their friends and neighbours, who ought to attend on this solemnity to testify their consent, and to join with the minister for a blessing on the parties. And lastly, I may briefly observe, that the bridegroom and bride, being thus attended

to the church, are there to stand at the altar, the man on the right hand, and the woman on the left; which position is expressly so ordered in the Latin and Greek churches. But among the Jews, the woman stands on the right hand of her intended husband, in allusion to that place of the Psalms, "At thy right hand did stand the queen in a vesture of gold," &c.\* Yet, since the right hand is the most honourable place, it is in all Christian churches assigned to the man, as being the head of the wife. And since matrimony has been throughout the whole world reputed a religious act, it is very fit that it should have a peculiar office for its performance. The Greek church has three several offices; one at the *espousals*, another at the actual *marriage*, which is called the *coronation*, and the third office is for those who are married a second time. In England the marriage rite is composed with peculiar judgment and piety, and all along instructs those who are to be joined by it in the several parts of their duty; and as it may be interesting to many, I will here add a brief description.

To prevent the vain and loose mirth too frequent at such solemnities, the office of matrimony begins with a grave and awful preface, which represents the sacred action to which the parties are preparing themselves, to be of so divine an original, of so high a nature, and of such infinite importance to all mankind, that they are not only vain and imprudent, but even impious and void of shame, who will not lay aside all levity and indecorum, and be serious and composed on so just and solemn an occasion. And to prevent any misfortune, into which the two parties might either inconsiderately or rashly run by this marriage, the minister charges all who are present, "if they know any just cause or impediment why they may not be lawfully joined together, they do now disclose it," before the holy bond be tied, since afterwards they cannot be heard to the benefit of either party. But though others are at first charged to discover all known impediments, as being most likely to reveal them, yet the minister before he proceeds to the solemnization, charges the parties themselves, as being most concerned, to reveal them, as they shall answer at the great day of judgment; since if there shall appear any just objection against their marriage afterwards, they must necessarily either live in a state of perpetual sin, or be separated by an eternal divorce. The impediments which they are so solemnly charged to reveal, are those already enumerated.

If the congregation present allege none of these impediments, and none be confessed by the parties themselves, the officiating minister proceeds to the solemnization of the marriage; which being a formal compact, the *mutual* consent of the parties is first asked, because their consent is so essential, that the marriage is not good without it. For this reason Rebekah's friends asked her consent before giving her to Isaac.†

\* Palm xiv. 10.

† Gen. xxiv. 53.

And in the firmest kind of matrimony among the ancient Romans, the parties mutually asked each others' consent, which being so important and universal a custom, was for that reason adopted into the office for matrimony in all Christian countries; with this only difference, that the priest asks the question, that so the declaration may be the more solemn, as being made in God's presence, and to his deputed minister. And that the parties may the better know what they are about to promise, the priest enumerates the duties which in God's word they are commanded to perform, *viz.*

The man must *first* promise to *love* his wife as God expressly commands,\* which stands in the first place, because if he has this true affection for his wife, he will perform towards her all other duties with ease and delight. It being no burden to render good offices to those whom we sincerely love. *Secondly*, That he will *comfort* her, which God also requires,† where the husband is enjoined to *cherish* his wife, that is, to support her under all those infirmities and sorrows to which her tender sex is liable. *Thirdly*, That he will *honour* her, which is also directly commanded.‡ Although the wife is the weaker vessel, yet she must not be despised for those infirmities which God, for good and wise purposes, has annexed to her constitution. She should rather be respected for her usefulness, and her ready desire to add to her husband's comfort. *Fourthly*, He must *keep her in sickness and in health*, which, according to St Paul, is to *nourish*,§ or to afford her all necessities in every condition. And lastly, he must be faithful to her bed, and *forsaking all others, keep himself only to her so long as they both shall live*, which corresponds with the words of prophets and apostles.|| This excellent sentence is placed in the marriage office to prevent those three mischievous destroyers of marriage, adultery, polygamy, and divorce.

There is no difference in the duties, nor consequently in the terms of the covenant between the man and his wife; only that the wife is obliged to *obey* and *serve* her husband, a duty frequently commanded by God himself in the New Testament.¶ Besides, the rules of society make it necessary, for equality breeds contention. It is therefore necessary that one of the parties should be superior, otherwise there would be a perpetual strife for dominion. Wherefore the laws of God, and the wisdom of all nations, have given the superiority to the husband. Amongst the ancient Romans, the law obliged the wife to be *subject* to her husband, and call him *lord*. They had a peculiar magistrate to take care that the husbands did not abuse this power, but that they ruled over their wives with

\* Eph. v. 25.

† ver. 29.

‡ 1 Pet. iii. 7.

§ Eph. v. 29.

|| Mal. ii. 15, 16. 1 Cor. vii. 10.

¶ Eph. v. 22, 24. Colos. iii. 18. Tit. ii. 5. 1 Pet. iii. 1, 5.



gentleness and tenderness. Consequently women not only may, but it is their bounden duty to pay all that obedience which the gospel requires of them. In Britain at least, they have no reason to complain with Medea, "that they are sold for slaves with their own money;"\* because in the obedience required of them in the gospel there is really no slavery. It ought to spring from their love to their husbands, and be paid in respect of the dignity of the nobler sex, and in requital for that protection which the weaker vessel both needs and enjoys in the holy estate of matrimony; but above all, it ought to proceed from the love and fear of God, who has enjoined it. In this observance the obedient wife finds it to be her interest as well as her duty, because she thereby gains so much more love and respect from her husband, that he cannot deny her any lawful and reasonable request. It is not only an impious contempt of divine authority, but egregious pride and folly, for any woman to refuse either to promise or to pay to her husband this generous obedience, which is her great privilege, if she has wisdom to understand, or skill to manage it right.

The two parties having given their consent to have each other, and promised to the minister that they will each observe those sacred laws of matrimony which God hath ordained, they proceed directly to the mutual stipulation or covenant, which is introduced with two very significant ceremonies. *First*, the father or friends giving the woman in marriage. The antiquity of such rite is evident from the phrase so often used in Scripture, of *giving a daughter to wife*; and its universality appears from its being used both by heathens and Christians in all ages. The reason for its use seems to be, *1st*, Because the weaker sex is always supposed to be under the tuition of a father or guardian, whose consent is necessary to make the act valid. *2d*, This declares that the parents and friends agree to this marriage, and that the father doth emancipate his daughter, and make her free to engage in her own name. *3d*, This shows that the woman does not *seek* a husband, but is *given* to one by her friends, and follows their commands, rather than her own inclinations. Among the nuptial rites of the ancient Romans, the bride was taken by a sort of violence from her mother's knees; and when she came to her husband's house, she was not to go in willingly, but was to be carried in by force, which, like the English ceremony of giving away, was very suitable to the modesty of the female sex.

The other ceremony is the *joining of hands*, which naturally signifies contracting friendship and the making of covenants, and has been universally used among heathens, Jews, and Christians, in the sacred covenant of marriage. The father delivers up his daughter to the priest, as it were

\* Eurip. in Medea.

into God's disposal; and he again, in God's presence, *joins their right hands*. Our right hand being generally used in plighting our faith to any person. Having thus delivered them into each other's hands and power,\* the minister causes them to make this mutual stipulation or engagement, than which nothing can be more strict or solemn. When in the former part of the ceremony he asked the parties their consent, they in the *future tense* promised to take each other in marriage. That was no more than *espousals*, which in former times was a different office entirely from that of matrimony, and might be done some weeks or even months before. But as men of loose morals were frequently apt to cast off their spouses before the completion of marriage, both the espousals and marriage were put into one office: only in the espousals the parties say, *I will take*, &c.; whereas in the marriage they say, *I do take*, &c. Each party first naming themselves, to show that it is their own voluntary act, and then specifying the other they have chosen, and declaring before Almighty God, that they do "take each other for husband and wife," and that in the nature of the firmest settlements, "to have and hold." These are words of such importance, that no conveyance of an estate can be made without them, and therefore they ought not to be omitted in this solemn act, because the man and woman are now to put themselves into the power and possession of each other: so that after this stipulation, in the solemn language of scripture, "the wife hath not power of her own body, but the husband; and likewise the husband hath not power of his own body, but the wife."† And to take away all exceptions that might be pretended for divorce, they solemnly promise to each other "from this day forward," during the whole term of their lives: and that whether they "prove better or worse," in respect of their mind or manners; or "richer or poorer," in respect of their estate; or whether they be "healthy or sickly," in respect of their body: and withal they promise to pay those duties to each other, which has been already shown are necessary and indispensable. And for the confirmation of this solemn vow and engagement, they "plight their troth" to each other; that is, they lay their truth to pledge, and in God's presence engage their honesty and fidelity for their performance of it.

But besides the *invisible* pledge of our truth, the man is also to give a *visible* pledge, *viz.* a ring. It was in ancient times a seal by which all orders were signed, and all choice things secured.‡ Its delivery was a sign that the party to whom it was given, was admitted into the nearest friendship and highest trust.‡ Hence it became a token of love,‡ and was used in matrimony, not only among the Jews and Gentiles, but among the Christians also in the primitive and purest times, who gave their spouses

\* 1 Cor. vii. 4.

† Ibid.

‡ Gen. xxviii. 18.—Esth. iii. 10, 12.—Macc. vi. 15.—Gen. xli. 42.—Luke xv. 22.

a ring at the time of marriage, to declare them worthy of the government of their family; and in consequence rings have been ever since used in marriage in all civilized countries. The ring's signification may be considered two ways: 1. By way of allusion; 2. By way of institution. The first sort of remarks, are those which are its more remote significations; viz. As to its matter, which is gold; the purest, the noblest, and the most durable of all metals, to intimate the generous, sincere, and unceasing affection which ought to subsist between married persons. 3. Its form, being round, is the most perfect of all figures, and the most proper to imply union, and that conjugal love which must never have an end. And 3. it is placed on the fourth finger of the left hand, which the pagan Romans, among whom it was customary, usually denominated the *ring-finger*. The ancients generally affirmed their belief that a considerable vein ran from the heart to this finger; which for that reason ought, they said, to bear the pledge of love. And although Dr Brown, in his "Vulgar Errors," will not admit this, yet the connexion of this finger with the heart has been maintained by very eminent authors, both ancient and modern, both Gentiles and Christians, physicians and divines. However the dispute may be settled, the moral ought to be retained, that by this ring the husband expresses the dearest love to his wife, which ought to reach her heart, and engage her warmest affection in return. But these are merely allegorical significations: the church has nobler intentions in this institution. Accordingly the ring is intended "to be a token and pledge of the covenant made between them," as is manifest from the words spoken at its delivery, and from the words of the prayer following. For it was customary in all covenants to appoint some durable thing to commemorate it; such as *Laban's heap*;\* *Joshua's stone pillar*;† and the money given in bargains as earnest or pledge. Hence the ring in marriage, which is a *visible* and lasting token of a solemn covenant, the sight of which ought to remind the parties of their mutual promises and vows.

Before the ring is placed on the woman's finger, the husband gives it to the minister, who returns it to him, to be bestowed upon his wife. Hereby intimating that it is our duty to offer up all that we have to God in the first place, as the true proprietor, before we use them ourselves, and to receive them as from his hand to be employed towards his glory. When the husband delivers the ring to his wife, he addresses himself to her, and declares audibly, *with this ring I thee wed*; that is, this is a pledge of that covenant of matrimony which I now make with thee. *With my body I thee worship*—whereby he acknowledges that he owes her respect or worship—and *with all my worldly goods I thee endow, in the*

\* Gen. xxxi. 62.

† Josh. xxiv. 26, 27.

*name of the Father, and of the Son, and of the Holy Ghost.* Thus giving her an interest in his estate, and sealing the whole by calling the Holy Trinity to witness his vow, and thus turning his promise into a most solemn and sacred oath.

The minister, who is God's representative, having ordered this marriage in all things agreeable to his Master's laws, sets His seal to it, by declaring in our Saviour's own words, "Those whom God has joined together, let no man put asunder."\* In conclusion, the minister pronounces a solemn benediction upon the parties in the name of the blessed Trinity.

The obedience which God has enjoined the wife, is not merely for the husband's gratification, but for a higher and nobler end; and in return for the honour with which he is invested, the fulfilment of corresponding duties is incumbent upon him. In every country, but especially in Christian countries, the laws affecting man and wife accurately set forth the offices of Christ and his church. The wife upon her marriage, loses her own name by its being absorbed into that of her husband; so the church is no longer sin and folly, but righteousness and wisdom in Christ. The wife, however mean her born condition, becomes equal in rank, even to be by marriage the partner of a throne: the poor mortal, dying church, shall sit upon Christ's throne, and be, as He is, a sovereign and a priest. The wife, whatever may be the amount of her debts, is not answerable, but the husband must defray them all. In like manner, the church, who was ruined, and had nothing wherewith to pay, has had every obligation discharged by the wealth and love of the Lord Jesus.

The line, then, of the husband's duty towards his wife, is according to that which the Lord pursues towards his spouse the church. In the parallel passage in his epistle to the Colossians, the apostle says, "Husbands love your wives, and be not bitter against them." Although he told the wives to "submit," he does not order the husband to "rule." Directions are seldom given to urge us to do that which we are naturally inclined to do, and all mankind have the love of power. Whenever a direction is given for any duty, we may rest assured that it is a warning to us that we are naturally disposed to violate it. As therefore a dislike to submit to her husband, is natural for a wife, so is it also natural for a husband's love to diminish towards his wife. The definition of what God means by love, is given in the first epistle addressed to the Corinthians, the parts of which that are principally applicable to the present case are, that it "suffereth long, and is kind—is not easily provoked, thinketh no evil—beareth all things—hopeth all things—endureth all things." Oh how genuine affection frames excuses for its object! How it puts the most favourable

\* Matth. xix. 6.

construction upon actions! How reluctant it is to impute unworthy motives! Yet the apostle's injunction implies that husbands are tempted even to be "bitter." But what can they have to bear from their wives, in comparison to what Christ has to bear from them? If Christ were not "to suffer long and be kind," what must become of all husbands from the days of Adam down to the day of judgment? If Christ were "easily provoked," where would any one be at the present moment? Where could love for their wives be manifested in these particulars, if their lives were one unceasing round of tenderness and affection? How would this earth prove itself the universal abode of sin and misery, and evil, if, in any one relationship of life, nothing were to arise to disturb its joys? Wherein could they testify love, if they found nothing to cross their wills? And, above all, where could the long-suffering of Christ towards his church be manifested by husbands, if they met with nothing to call it forth?

I cannot avoid inserting here the touching appeal which Mr Jay puts into the lips of married women to their husbands: "Honour us; deal kindly with us. From many of the opportunities and means by which you procure favourable notice, we are excluded. Doomed to the shades, few of the high places of the earth are open to us. Alternately we are adored and oppressed. From our slaves, you become our tyrants. You feel our beauty, and avail yourselves of our weakness. You complain of our inferiority, but none of your behaviour bids us rise. Sensibility has given us a thousand feelings, which nature has kindly denied to you. Always under restraint, we have little liberty of choice. Providence seems to have been more attentive to enable us to confer happiness than to enjoy it. Every condition has for us fresh mortifications; every relation, new sorrows. We enter social bonds; it is a system of perpetual sacrifice. We cannot give life to others without hazarding our own. We have sufferings which you do not share, cannot share. If spared, years and decay invade our charms, and much of the ardour produced by attraction departs with it. We may die. The grave covers us, and we are soon forgotten: soon are the days of your mourning ended, soon is our loss repaired: dismissed even from your speech, our name is to be heard no more: a successor may dislike it. Our children, after having a mother by nature, may fall under the control of a mother by affinity, and be mortified by distinctions made between them and her *own* offspring. Though the duties which we have discharged invariably, be the most important and necessary, they do not shine; they are too common to strike; they procure no celebrity: the wife, the mother, fills no historic page. Our privations, our confinement, our wearisome days, our interrupted, our sleepless nights,—the hours we have hung in anxious watching over your sick and dying offspring—But we forbear."

At the risk of being tedious, I must now notice the unnatural prohibition of marriage in the church of Rome, which the apostle calls a "departing from the faith—fobidding to marry."\* Bellarmine, in his disputations, endeavours to make the celibacy of the clergy to be *jure divino*: but if not so, yet he endeavours to prove that it has been enjoined by canons of as great antiquity as the apostles' times. A manifest absurdity, but which we shall not tire our readers' patience by disproving. The English and Scottish clergy struggled long and vigorously against this antichristian law of the pope, and in spite of all the laws and canons continued to marry, till Anselm, archbishop of Canterbury, a Burgundian by birth, a powerful and factious prelate, held a synod or national council at Westminster, in the year 1030, and there procured a severe canon against the marriage of the clergy. But the inferior clergy universally resisted, and refused to repudiate their wives and take concubines in their place. In consequence of this firmness in the English clergy, he convoked a second council, where he enacted still more severe canons against the married clergy, in the presence of the king and all his nobility, which he most rigorously enforced, but still was unable to effect his purpose. William Corboyl, one of his successors in the see of Canterbury, followed Anselm's system, and was canonized as a saint at Rome. In 1126, he summoned a synod at Westminster, to make new canons against the married clergy, in which John de Crema, the pope's legate made a most elaborate speech in favour of celibacy and chastity, and in which he inveighed against the married clergy with great bitterness. This same John de Crema was, however, found in bed with a concubine that very night. Up to the period of the Reformation, the married clergy were persecuted by their Roman taskmasters, and lay under this bondage for upwards of three hundred years. But although the pope would not permit the clergy to marry, yet they were not forbidden to keep concubines, provided it was not done publicly nor with scandal, *publice nec cum scandalo*; nor were they allowed open or avowed access, *publicum accessum*. For which purpose, there is extant a canon passed in 1222, in a council held under Stephen Langton, at Oxford. And it appears by the *centum gravamina*, that were presented to the pope in the year 1521, by the German princes, that it was one of the grievances of that nation, that the pope permitted the clergy, both regular and secular, to live publicly with their harlots, and beget children. And that in most places the Romish bishops and their officials, not only tolerated concubinage upon the payment of fines, among the more dissolute sort of monks, but also exacted it of the most continent. Alleging that if they did not keep a concubine they might, for it was

\* 1 Tim. iv. 1, 3.

in their choice whether they would or not. So upon the whole, it appears that the church of Rome allowed their clergy to keep a concubine privately, if without scandal; but forbids them to marry, under pain of deprivation, as being a sin against the Holy Ghost.\*

In Henry VIII.'s time, and subsequently, various acts of parliament on the subject of the marriage of the clergy were enacted. In his 31st year an act was passed, "whereby it was made felony for a priest carnally to use a woman to whom he had been married or contracted; or even if he kept company or familiarity with her. If any priest kept a concubine, as by paying for her board, maintaining her with money or other gifts, or means to the evil example of others, he should forfeit all his goods, chattels, and spiritual promotions, and be put in prison for the first offence, and the second offence to be felony." But this act appearing too severe, was next year considerably mitigated. The act in the 31st Henry VIII., commonly called the "act of the six bloody articles," by the third article of which it was declared "that priests after they have received holy orders might not marry, and to affirm the contrary thereof was declared to be *heresy and treason*;" but this bloody act was repealed. By act of parliament Edward VI. declared "all laws, statutes, canons, ordinances, and constitutions made *against* the marriage of priests to be *null and void*; that the marriage of priests is lawful, and their children legitimate; that they were entitled to endow their wives, and to be tenants by the courtesy." On her accession Mary repealed this law, which repeal Elizabeth continued all her reign, till king James's accession, when he revived and made the above law of Edward VI. perpetual. It appears, therefore, that all acts of parliament, canons, constitutions, &c., that restrain the marriage of the clergy, or that render their children illegitimate, are altogether null and void. But that the canons and acts of parliament which punish their incontinency stand in full force. The Westminster Confession of Faith fully acknowledges the right of the clergy to lawful wedlock. The church of England does the same. Her thirty-second article says, "bishops, priests, and deacons, are not commanded by God's laws, either to vow the estate of single life, or to abstain from marriage; therefore it is lawful for them, as for *all* other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness."

II. The next point for consideration, is the manner in which marriages may be dissolved; which is either by death or divorce. There are two kinds of divorce; the one total, the other partial. The one is, a *vinculo matrimonii*, the other is merely a *mensa et thoro*. The total divorce, a *vinculo matrimonii*, must be from some of the canonical causes of im-

\* Johnson's Vade Mecum. Burns' Ecol. Law.

pediment already mentioned, where the marriage is declared null, as having been absolutely unlawful *ab initio*.

Divorce *a mensa et thoro*, is where the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it. But from some supervenient cause, it becomes improper or impossible for the parties to live together.

In case of divorce *a mensa et thoro*, the law allows alimony to the wife. It is that allowance which is made to a woman for her support out of the husband's estate; and which is settled at the discretion of the ecclesiastical judge, on due consideration of all the circumstances in the case. It is generally proportioned to the rank and quality of the parties; but in case of elopement the law allows her no alimony.

III. The legal consequences of making or dissolving marriages, naturally follow what has already been said.

By marriage, the husband and wife become in law one person. That is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. For this reason a man cannot grant anything to his wife, or enter into covenant with her. The grant would be to suppose that she had a separate existence. To covenant with her, would only be to covenant with himself; and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman, indeed, may be her husband's attorney; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything to his wife by will; because that cannot take effect till the convention is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself. If she contracts debts for them, he is obliged to pay them. But for anything besides necessaries, he is not chargeable. Also if a wife elopes, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprized of her elopement. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she cannot bring an action for redress, without her husband's concurrence, and in his name as well as her own. Neither can she be sued, without making the husband a defendant. There is indeed one case where the wife can sue and be sued as a *feme sole*, or single woman, *viz.* where the husband has abjured the realm, or is banished, because in either of these cases he is considered dead in law. And the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she were allowed no remedy, or could make no defence at all. It is true, that in criminal prosecutions, the wife



may be indited and punished separately, for the union is only a civil union. But in trials of any sort, they are not allowed to be evidence for, or against each other. Partly because it is impossible that their testimony should be indifferent, but principally because of their union of person. But where the offence is directly against the person of the wife, this rule has usually been dispensed with. And therefore, agreeable to the statute 3 Henry VII., c. 2, in case a woman be forcibly taken away and married, she may be a witness against her husband, in order to convict him of felony. Because under such circumstances, she cannot with propriety be considered his wife, since the main ingredient, *her own consent*, was wanting to the contract. There is also another maxim of law, that no man shall take advantage of his own wrong; which he would do, if by forcibly marrying a woman, he could prevent her from being an evidence, who is perhaps the only witness to that very fact.

In the *civil* law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries. And therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband.

But, though our law in general considers man and wife as one person, yet there are some instances, in which she is separately considered, as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void. Except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act was voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her. But this excuse does not extend to treason or murder.

These are the chief legal effects of marriage during the coverture. Upon which we may observe, that even the disabilities, under which the wife lies, are, for the most part, intended for her protection and benefit.\*

By the law of England, marriage is both a civil and a religious contract. It is the conjunction of one man with one woman in a constant society and agreement of living together, until the contract is dissolved by death, or breach of faith. It is one of the rights of human nature, instituted in a state of innocency, and for the preservation of chastity. By the laws of England nothing more is requisite to a complete marriage, than a full, free, and mutual consent between the parties, provided they are not dis-

\* Blackstone's Commentaries.—Clergyman's Vade-mecum.—Dragge's Counsellor.—Wheatly on the Common Prayer.—Burns' Ecclesiastical Law.—Social Duties.

abled from entering into that state by their near relation to each other, infancy, precontract, or impotency.\*

By the law of Scotland, marriage is a civil contract between a man and a woman, whereby they unite themselves for life in a domestic society, for the mutual solace and comfort of each other; and having in view chiefly the propagation of the species and the rearing of a family. This contract is indissoluble, except by the death of one or other, or both of the parties; or by divorce, founded on adultery or desertion. Impotency, or a natural incapacity on either side for procreation, being not so much a ground for divorce, as an essential nullity, in respect of which the contract may be declared to have been void from the first.†

To constitute a valid marriage in Scotland, the parties must have arrived at the age of puberty. That is, the male must be fourteen, and the female twelve years of age, before they are held legally capable of giving consent. After that age, parties may validly intermarry, provided there is no legal disqualification. In order to constitute a legal marriage in Scotland, the consent of parents or curators is not necessary. A regular marriage is performed by a minister, in the presence of witnesses, and is preceded by the publication of banns. Clandestine marriage is also celebrated by a minister, and is equally effectual as a regular marriage. The minister and the parties are however both liable to penalties; the minister to banishment, and the parties themselves to fine and imprisonment. Marriage in Scotland being merely a civil contract, may be completed by consent alone, solemnly and deliberately given before witnesses, even without carnal knowledge; *consensus non concubitus facit matrimonium*, being a maxim of Scottish law. A promise or engagement to marry, followed by cohabitation, constitutes marriage. A promise or engagement to marry, however formal, where no carnal knowledge has taken place, may be retracted; but the party withdrawing is liable in damages for breach of promise. Mr Erskine says: "It is not necessary that marriage be celebrated by a clergyman. The consent of parties may be declared before any magistrate, or simply before witnesses. When the order of the church is observed, the marriage is called regular; when otherwise, clandestine. Towards a regular marriage, the church requires proclamation of banns in the churches where the bride and bridegroom reside. Formerly, not only bishops, but presbyteries, assumed a power of dispensing with proclamation of banns on extraordinary occasions: but this has not been exercised since the Revolution."‡

As a marriage may be thus constituted by a promise followed by a *copula*, it may be acknowledged by writing, or to the midwife who

\* Tomline's Law Dict.

† Bell's Law Dict.

‡ Erskine's Principles, pp. 62—64.

delivered, or to the minister who christened the child born in such cohabitation. But for the purpose of ascertaining the *status*, the written acknowledgment must be produced and acted on, during the life of both parties. The production of the written acknowledgment after the man's death will not do. It will not give the woman the character of a widow. Marriage may be inferred from cohabitation; from the parties living together at bed and board; and from being habit and repute husband and wife. Generally speaking, the exchange of mutual consent in the presence of witnesses, or cohabitation, or habit and repute, may be proved by parole evidence. If carnal knowledge has not followed a promise of marriage, it can be competently proved, in the ordinary case, only by writing, or the oath of parties.

The disqualifications, according to the law of Scotland, are of two sorts. Either such as that no marriage can take place where they exist; or such as afford grounds for dissolving the marriage. 1. Pupillarity, since a person before arriving at the age of puberty is not legally capable of giving consent. 2. Defect of judgment, idiocy, &c. 3. Impotency, 4. A previous marriage which still subsists. 5. By the act 1800, c. 20, a marriage between a divorced person and his or her paramour, mentioned as such in the decree of divorce, is declared illegal.\* Propinquity within the forbidden degrees, is a ground for dissolving marriage. The act 1547, c. 15, adopts the Jewish law, and declares that marriage shall be as free as God has permitted it.†

II. PARENT AND CHILD.—The next, and most universal relation in nature, and immediately derived from the preceding state of husband and wife, is that subsisting between parent and child.

There are two sorts of children: legitimate and illegitimate.

I. A legitimate or lawful child, is he that is born in lawful wedlock, or

\* Divorce is a judicial dissolution of the conjugal society while both the parties are living. They are then at liberty to intermarry with others. By the law of Scotland, a divorce may be obtained on the ground of adultery, and also of wilful desertion. Neither of these grounds dissolves a marriage *ipso jure*. The marriage subsists, notwithstanding the adultery or desertion, unless a process of divorce is instituted. If the party injured by adultery continue the matrimonial connexion after knowledge of the crime, it is held to be an irrevocable forgiveness of the offence. An act of adultery so overlooked cannot afterwards be the grounds of a divorce. When the divorce proceeds on wilful desertion, the act\* requires that the offending party shall have abandoned the conjugal society for four consecutive years, maliciously and without just cause. After such desertion, if he or she disregards the admonition of the church to adhere, a decree of divorce may be pronounced. The action of divorce proceeds before the commissaries of Edinburgh, and the pursuer must make oath that the action is not collusive. In divorce, on the grounds of desertion, the offending husband is bound to restore the dower, and to fulfil to the wife all her legal or conventional provisions. The offending wife forfeits her dower and all her legal and conventional rights.† Marriages contracted between the adulterer and the person with whom he or she is declared to have committed the crime, are declared to be null and unlawful, and the issue of such marriages to be incapable of succeeding to their parents.‡

† Bell's Law Dict.—Erskine's Principles of the Law of Scotland.

\* 1578, c. 55.

† Act 1800, c. 20.

‡ Bell's Law Dict.

within a competent time afterwards. In this article we shall inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1. The duties of parents to their legitimate children, principally consist in their maintenance, their protection, and their education.

The duty of parents to provide for the *maintenance* of their children is a principle not only of natural law, but is of divine authority, for the apostle assures us, that the man who neglects this natural duty "is worse than an infidel, and has denied the faith." And our blessed Lord, in his sermon on the mount, after assuring us of our heavenly Father's ears being ever open to our prayers, bidding us only *ask*, and we shall receive; seek, and we shall find; knock, and it shall be opened unto us; says, "Or what man is there of you, whom if his son ask bread, will he give him a stone? Or if he ask a fish, will he give him a serpent? If ye then, being evil, know how to give good gifts unto your children, how much more shall your Father which is in heaven give good things to them that ask him?"

It is a principle of law, that there is an obligation on every man to provide for those descended from his loins; and I will now show how this obligation is to be performed, according to several statutes for that purpose. The father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the quarter sessions shall direct. If a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards the relief of the deserted children. According to the interpretation which the courts of law have made upon these statutes, if a mother or grandmother marries again, and before such second marriage, was of sufficient ability to keep the child, the second husband shall be charged to maintain it. Because this being one of the wife's *debts* when single, which it has been before explained, the husband is obliged to take upon himself, this also, like others, falls to the new husband's charge. But at her death, the relation being dissolved, the husband is under no farther obligation to maintain these children.

No person is, however, bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident. And even then he is only obliged to find them with necessaries, the penalty on refusal being no more than twenty shillings a-month.

The law has made no provision to prevent parents from disinheriting their children by will. It leaves every man's property in his own disposal, upon a principle of liberty in this, as well as every other action. Heirs

however, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words. The law requires the utmost certainty of the testator's intentions to take away the right of an heir before it be admitted. The transition is natural and easy from the duty of *maintenance* to that of *protection*. This is also a natural duty, but is rather permitted than enjoined by our municipal laws; nature working in this respect so strongly, as to need rather a check than to require a spur. A parent may maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels; and he may also justify an assault and battery in defence of the persons of his children.

The last duty of parents to their children, is that of giving them an education suitable to their station in life. This duty is pointed out not only by reason, but chiefly by revelation, and is of the greatest importance of any. God himself was pleased to commend Abraham, "because," said HE, "I know him, that he will command his children and his household after him, and they shall keep the way of the Lord to do justice and judgment."\* The wise king of Israel recommends the fathers of his day, and though dead, he yet speaks to us, "train up a child in the way he should go, and when he is old, he will not depart from it."† The wise son of Sirach also says, that "a horse not broken becometh headstrong, and a child left to himself will be wilful."‡ "Hast thou children? instruct them, and bow down their neck from their youth."§ But, above all, "the illustrious apostle of the Gentiles commands his Colossian converts, "Fathers, provoke not your children to anger, lest they be discouraged."|| "And ye, fathers, provoke not your children to wrath; but bring them up in the nurture and admonition of the Lord."¶ It is not, however, for a moment to be supposed that children owe no duties towards their parents. On the contrary, the Scriptures are express in enjoining submission and obedience on the child. "Honour thy father and thy mother, that thy days may be long in the land which the Lord thy God giveth thee."\*\* This, which is the fifth commandment in the decalogue, is by an apostle called the *first* commandment with promise. "And he that smiteth his father or his mother, or he that curseth his father or his mother, shall surely be put to death."†† The father stands to his young child in the place of God; as the author of its existence, the giver and preserver of its life. The mother stands as the church, which is the mother of us all, to whom the instruction in all godliness and righteousness of her Lord's children is intrusted. Thus the parents' faith becomes in a great degree the faith of the child. Say to yourself, although the extent of my dominion is the smallest upon earth,

\* Gen. xviii. 19.  
J Colos. iii. 21.

† Prov. xxii. 6.  
† Eph. vi. 4.

‡ Eccles. xxx. 8.  
\*\* Exod. xx. 12.

§ Ibid. vii. 23.  
†† Exod. xxi. 15, 17.

why is the authority given me the most extensive out of heaven? Within my own family, there is no one who can, none who should dispute this with me; and of those around my dwelling, from the highest authority in the state, to my next door neighbour, there is none disposed to interfere. Above myself upon earth there is none; and to myself I sometimes feel as though in this matter, I were only next under God. True, as it regards mankind in general, whatever be your station, high or low, as parents, unquestionably you are next under God. High and ennobling dignity, joined to an awful responsibility! In early times, and even down to the establishment of Christianity by Constantine, the father had power of life and death over his children, as well as indeed over all the other members of his family.\*

There is no dictate of nature more impressed upon us in Scripture, than the obedience of children to their parents, as witness the Scriptures already quoted. And it is remarkable, that in the first command with promise, a blessing is added, "that it may be well with thee, and that thou mayest live long upon the earth." In this command, our duty to our governors both in church and state is contained. The one is our spiritual, and the other our political fathers; and our rebelling against them, and taking the sword, will cause us to perish with the sword, and so shorten our days. God promises that upon our obedience it shall be well with us; and HE expresses his own authority over us, by the obedience we owe to our natural fathers. "If I be a father, where is mine honour?"† Children owe honour and obedience to the mother, but in *subordination* to the father, so that if their commands should interfere, those of the father must be obeyed. It cannot be supposed that her power over her children can be equal to the father's, from the dominion and rule which God gave to the husband over the wife, noticed in the last article, on husbands and wives. Unquestionably the mother possesses a power and authority over her children, but the *supreme* power belongs only to the father, for he commands both mother and children. Therefore, when God asserts his supreme authority over the children of men, he always calls himself our *Father*, but never our mother. The church, which is subordinate to him, is in this sense our mother. The Westminster Confession of Faith, which is the standard of doctrine and discipline of the establishment of Scotland, says in explanation of the fifth commandment, that "*by father and mother*, are meant not only natural parents, but all superiors in age and gifts, and especially such as, by God's ordinance, are over us in the place of authority, whether in family, church, or commonwealth. Superiors are styled *father and mother*, both to teach them in all duties towards

\* Social Duties.

† Mal. i. 6.

their inferiors, like natural parents, to express love and tenderness towards them according to their several relations, and to work inferiors to a greater willingness and cheerfulness in performing their duties to their superiors as to their parents." And again, "the reason annexed to the fifth commandment, is an express promise of long life and prosperity, as far as it shall serve for God's glory and their own good, to all such as keep this commandment."\* And that it relates to our spiritual and political, as well as to our fathers after the flesh, is the common and received opinion of the whole Christian church. In explaining this commandment, the church of England teaches; in the question concerning our duty towards our neighbour in her catechism, that to "honour thy father and thy mother," is, "to honour and obey the king, and all that are put in authority under him. To submit ourselves to all our governors, teachers, spiritual pastors, and masters. To order ourselves lowly and reverently to all our betters." Under which commandment the whole economy of government, from the highest to the lowest, is included, and deduced from it. Overall, in his Convocation-book,† more largely explains and asserts it, when he says, "that it is generally agreed upon, that obedience to kings and civil magistrates is prescribed to all subjects in the fifth commandment, where we are enjoined to honour our parents. Whereby it followeth, that subjection of inferiors unto their kings and governors, is grounded upon the very law of nature; and consequently, that the sentences of death, awarded by God himself, against such as showed themselves disobedient and incorrigible to their parents, or cursed them, or struck them, were likewise due unto those who committed any such offences against their kings and rulers, being the heads and fathers of their commonwealths and kingdoms."

In different ages and nations, the supreme power has been called by different names, such as king, emperor, governor, protector, patriarch, captain, judge, &c. Every one bearing any of these titles took the name of *father* of his country. By any or all of these names the *supreme power* was meant; which having been originally lodged by God in Adam, he may be called by any or all of these titles, though that of *father* was the most ancient, and includes all the rest. Dr Overall, before cited, says that the reason why Adam's power is called patriarchal, regal, or imperial is, because it had no superior authority or power over or above it on earth. That he had the power of life and death over his children, is evident from the case of Cain. From Adam all mankind have deduced their authority over their wives and children. Judah commanded his daughter-in-law, Tamar, to be burnt, for having played the harlot; but

\* Westminster Confession, 291--302.

† P. 25.

when he found that it was by himself, he forgave her; which showed that he had absolute sovereign power in his own family, for no one pretended to a right to punish him for his share of her crime. The mother's power over the children was not co-ordinate or equal, but subordinate to the father's. Although the mother is joined with the father in the thirteenth chapter of the prophecy of Zechariah, yet it is to express the prophet's greater abhorrence of the sin of blasphemy in the son, and to show that her love and compassion as a mother, must yield to her duty and regard to God. But suppose that she should, from her tenderness to the son of her womb, have refused to have joined in "thrusting him through," that would not have taken away the father's power to have done it by himself. Or suppose again, that the father should have pardoned and acquitted him for the sin of blasphemy, the mother could neither have condemned nor executed him against the father's authority. Another proof from our own experience still further shows, that the laws of our own and all other countries show that the mother's authority over her children is subordinate to the father's. In the cases of government, titles, and property, all these immediately, on the death of the father, descend to his eldest son, or at all events to his nearest heir, but do not devolve on the mother as his survivor. The queen, from being the king's consort and superior to her son, immediately on the king's death sinks down into the queen-dowager, and becomes *subject* to her son. In the descent of private inheritances and titles, the mother has a dowry, but the title or estate descends to her son, who then becomes her superior, and the head of his father's house. This has been the custom of the whole earth from the beginning of the world, both civilized and barbarian. What has always been, and whose beginning we know not, must have been from the beginning, and *therefore* must be of God's appointment. Every husband and father derives his power and authority over his wife and children by lineal succession from Adam, on whom it was originally conferred by God himself.\* The priesthood as well as the civil government was annexed to the primogeniture or the eldest son, and was exercised by the first-born till God took the Levites for his priests. "And I, behold I have taken the Levites from among the children of Israel, *instead* of all the *first-born* that openeth the matrix among the children of Israel, therefore the Levites shall be mine, because all the first-born are mine."† The same is again repeated, "and I have taken the Levites for all the *first-born* of Israel."‡ And to impress more strongly and decisively the dignity of the first-born, He sanctified the *firstlings* of beasts to be sacrificed unto himself. Even from the beginning of the world, from the first institutions of sacrifices, they were not to

\* Gen. iii. 16.

† Num. iii. 12, 13.

‡ Ibid. viii. 18.



take from the flocks and herds indiscriminately, but the firstlings only. And we find that Abel observed this, by sacrificing the firstlings of his flock.\* Under the law, whatever *first* opened the womb, whether of man or beast, was holy unto the Lord.†

The word *birthright*, or *first-born*, is always used to express great dignity. Thus king David, who was the eighth and youngest son, is called the *first-born*.‡ Ephraim also is called the *first-born*, and set before his elder brother Manasseh.§ Reuben was rejected from the dignity of the primogeniture, on account of having defiled his father's bed by lying with his father's concubines.|| Simeon and Levi were also rejected on account of their cruel massacre of the Sichemites, in the matter of their sister Dinah's ravishment; and Judah, the fourth son, was preferred to the rights and privileges of the *first-born*. The *dominion* over his father's house and descendants was given to him, and thus expressed: "Judah, thou art he whom thy brethren shall praise: thy hand shall be in the neck of thine enemies: *thy father's children shall bow down before thee*:—the sceptre shall not depart from Judah, nor a lawgiver from between his feet, until Shiloh come, and unto him shall the gathering of the people be."¶ Joseph's blessing follows afterwards, according to the order of his birthright. To him was given what Jacob had "taken from the Amorite with his sword and with his bow," as an act of special favour for his wonderful preservation and support of his father and all his brethren for so many years in the land of Egypt. The blessings pronounced on his sons by Jacob, in the forty-ninth chapter of Genesis, were not applicable to the time in which they were spoken, but were prophetic. He gave the *dominion* to Judah, which his three elder brothers had forfeited, with a prophetic announcement that through his family our Saviour should come. The sceptre here alluded to, was given to Judah in David of that tribe, and ordained to continue in the hereditary succession of the eldest son. Hence our Saviour, who came of the tribe of Judah, is called the Son of David. This was the dominion which was to endure for ever in the person of our blessed Lord, our elder brother. Mr Poole, a most learned dissenter, in his synopsis says, there were three prerogatives of the primogeniture—the priesthood; the dominion, or civil government; and the double portion. At first, these prerogatives were united in the *first-born* son, but God was afterwards pleased to divide them. The *priesthood* was given to Levi, instead of the *first-born*.\*\* And the *dominion*, or civil government, was given to Judah†† for the reasons already given. Although

\* Gen. iv. 4.

§ Jer. xxxi. 9.

\*\* Num. iii. 12.

† Exod. xiii. 2. Num. iii. 13.

|| Gen. xlix. 4. 1 Chron. v. 1.

†† 1 Chron. xxviii. 4.

‡ Ps. lxxxix. 27.

¶ Gen. xlix. 8, 10.

God may alter his own institutions, yet we must not alter what he has appointed.

2. The power of parents over their children is derived from their duty, which has already been considered. This authority being conferred, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. He may lawfully correct his child, being under age, in a reasonable manner; because this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child, being under age, was also directed by our ancient law to be obtained. But now it is *absolutely necessary*, because without the parent's consent the contract of minors is void. A father has no more power over a son's *estate*, than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants. A father's *legal* power over the persons of his children ceases at the age of twenty-one. As before observed, a mother is not entitled to power, but only to reverence and respect. At twenty-one, being the legal years of discretion, they are enfranchised, and the empire of the father, or other guardian, gives place to that of reason. Yet, till that age arrives, this paternal empire continues even after the death of the father, for he may by his will appoint a guardian to his children. He may also, during his own life, delegate a part of his parental authority to the tutor or schoolmaster of his child, who is then in *loco parentis*, and has such a portion of the parent's power committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after. They who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age. They who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws.

It is the duty of children to pay all external honour, civility, and respect, to their parents. "Hearken," says Solomon, "unto thy father that begat thee, and despise not thy mother when she is old." Let such as neglect these and similar exhortations of the wise man, dread his threatenings, that "the eye which mocketh at his father, and despiseth to obey

his mother, the ravens of the valley shall pick it out, and the young eagles shall eat it." But if parents, through fondness or want of judgment, take off the restraints, and remove the barriers, which keep their children in due and salutary subjection to their authority, they may have cause to repent of their folly. If there happen to be no miscarriage, it is not owing to their own discretion, but to the grace of God working in their children's hearts. Children ought not to pry into their parents' infirmities and failings, but endeavour to conceal them, and suppress even the thought of them in their own hearts. Let them never forget, that when Noah "planted a vineyard, and drank of the wine, and was drunken; and he was uncovered within his tent: and Ham, the father of Canaan, saw the nakedness of his father, and told his two brethren without;" a curse was pronounced upon Ham, which has ever since apparently stuck to his descendants, the poor Africans, to this day. And our fathers' nakedness may be exposed by speaking of, or exposing their sins, weaknesses, or infirmities. And that children may the better discharge this part of their duty, as it is partly in the parents' power, so should it be their earnest endeavour to set them the best example, and not to *offend* any of these little ones. Our Saviour assures us "it were better that a millstone were hanged about a man's neck, and he were drowned in the depth of the sea,"\* than that he should *offend* his children. By *offence* is here meant, the setting them a bad example. Because, as precept is ever of less importance than example, they are much more apt to follow a bad example than to be led and governed by a good precept.

II. We are next to consider the case of illegitimate children or bastards. And, 1. Who are illegitimate. 2. The legal duties of the parents towards a natural child. 3. The rights and incapacities attending such children.

1. An illegitimate child, is one that is not only begotten, but born out of lawful matrimony. Against which God's law is express, "*Thou shalt not commit adultery.*" The civil and canon law do not allow a child to remain illegitimate, if the parents afterwards intermarry. All children, therefore, who are born before matrimony, are illegitimate by the law of England. In Scotland, the subsequent intermarriage of the parents, provided neither of the parties have made an intermediate marriage, renders the children previously born legitimate, and capable of inheriting. But in England it is only those born in lawful marriage that are legitimate, those born before, even although the parents do afterwards marry, are illegitimate. A recent case in point is the Berkeley peerage, the present earl being the fifth son of the same parents.

\* Matt. xviii.

2. The duty of parents to their natural children, *by law*, is principally that of maintenance. Nevertheless, the duty of education and religious instruction, is by no means to be neglected.

3. I proceed next to the rights and incapacities which appertain to an illegitimate child. The rights are very few, being *only* such as he can *acquire* by his own genius and industry. He cannot inherit anything, being looked upon as the son of nobody, and is in law sometimes called *filius nullius*, and sometimes *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance, and ought to take his mother's name. All legitimate children have their primary settlement in their father's parish, but a natural child in the parish where he was born, for he has in law no father. Natural children, born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong. The incapacity of an illegitimate child consists principally in this, that he cannot be any one's heir, neither can he have any heirs, but only of his own body. Being nobody's son, *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. The king's transcendent power can make a natural child legitimate and capable of inheriting, by an act of parliament, as has been frequently done. In former times, the unmarried clergy of the Romish church procured letters of legitimation for their bastards, which by courtesy were called *nephews and nieces*, in order that they might inherit their private property. Bastardy incapacitates a man from taking holy orders.\*

III. GUARDIAN AND WARD.—The next general private relation remaining to be discussed, is that of guardian and ward. A relationship which bears a strong resemblance to the last, and indeed is plainly derived out of it. The guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians. How they are appointed, and their power and duty. Next the different ages of persons, as defined by the law. And lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

Of the different species of guardians, the first are such *by nature*; viz. the father, and in some peculiar cases, the mother of the child. If an estate be left to an infant, the father, by common law, is the guardian, and must account to his child for the profits. And with regard to daughters, it seems that the father might by deed or will assign a guardian to any female child under the age of sixteen; and if none be so assigned, the mother shall in this case be the guardian. There are also guardians *for nurture*, which of course, are the father or mother, till the infant

\* Blackstone.—Social Duties.—View of the Times.

attains the age of fourteen years. In default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and provide for his maintenance and education. Next are guardians-in *socage*, who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in land, and then, by the common law, the guardianship devolves on his next of kin to whom the inheritance cannot possibly descend. Such as in the case of the estate descending from the father, then his uncle by the *mother's* side, who cannot possibly inherit this estate, shall be the guardian. Because the law judges it improper to trust the person of an infant in his hands who may by possibility become his heir, that there may be no temptation, nor even suspicion of the kind, for him to abuse his trust. These guardians *in socage*, like those for nurture, continue only till the minor is fourteen years of age. For then in both cases he is presumed to have discretion, so far at least as to choose his own guardian. This he may do, unless one has been appointed by his father till he has attained the age of twenty-one. These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London and other places, but they are particular exceptions, and do not fall under the general law.

The power and reciprocal duty of a guardian and ward, are the same, *pro tempore*, as that of a father and child, and therefore need not be here repeated. But this only may be added, that the guardian, when the ward comes of age, is bound to render him an account of every transaction entered into on his behalf, and must answer for all the losses incurred by wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, especially of large estates, to indemnify themselves, by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For by the right conferred on him by the crown, the lord chancellor is the general and supreme guardian of all infants, as well as idiots and lunatics. That is, of all such persons as have not sufficient discretion to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check and punish him; nay, will sometimes proceed to his removal, and will appoint another in his stead.

I will next consider the ward or person within age, for whose assistance and support these guardians are constituted by law, or who it is that is said to be within age. The ages of males and females are different, for different purposes. A *male* at *twelve* years old may take the oath of allegiance. At *fourteen* he is at the years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and if his discretion be actually proved, may make his testament of his personal

estate. At *seventeen* he may be an executor. At *twenty-one* he is at his own disposal, and may *alien* his lands, goods, and chattels. A female also at *seven* years, may be given in marriage. At *nine* she is entitled to dower. At *twelve* she is at years of maturity, and therefore may consent or disagree to marriage, and if proved to have sufficient discretion, may bequeath her personal estate. At *fourteen* she is at years of *legal* discretion, and may choose a guardian. At *seventeen* she may be an executrix. And at *twenty-one* she may dispose of herself and lands. So that full age in male or female is *twenty-one* years. Which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law.

Infants have different privileges, and various disabilities. But their very disabilities are privileges, in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks, as well by law as otherwise. But he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochien amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochien amy*, institutes a suit in equity against his fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence; but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty; for the infant shall, generally speaking, be judged *prima facie*, innocent. Yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, although he may not have attained to years of puberty or discretion. Sir Matthew Hale gives two instances: one of a girl of thirteen, who was burned for killing her mistress. Another of a boy still younger, that killed his companion and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil. In such cases the maxim of the law is, that *malitia supplet ætatem*. So in much more modern times, a boy who was ten years old, and guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of the judges. Two or three years ago, a boy who murdered another boy in a coppice near Chatham, was hanged for the murder, though he was under fourteen years.

With regard to estates and civil property, an infant has many privileges. This may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his rights, nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

It is true in general, that an infant can neither aliene his lands, nor do

any legal act, nor make a deed, nor indeed any manner of contract that will bind him. As legal trustees, or mortgagees, they are enabled to convey, under the direction of the court of chancery or exchequer, or other court of equity, the estate they hold in trust or mortgage, to such person as the court shall appoint. It is also generally true, that an infant can do no legal act. Yet, an infant who has an advowson or patronage of a church, may present to the benefice when it becomes void. For the law in this case dispenses with one rule, in order to maintain others of far greater consequence. It permits an infant also to purchase lands, but his purchase is incomplete. When he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason, and so may his heirs after him, if he dies without having completed his agreement. He may, in some cases, bind himself apprentice, by deed indented, or indentures, for seven years; and he may by deed or will, appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him. Yet he may bind himself to pay for necessary meat, drink, apparel, physic, and such other necessities. Likewise for his good teaching and instruction, whereby he may profit himself afterwards.\*

IV. MASTER AND SERVANT.—In discussing the relation of master and servant, I shall first consider the several sorts of servants, and how this relation is created and destroyed; secondly, the effect of this relation with regard to the parties themselves; and lastly, its effect with regard to other persons.

I. The first description of servants which are acknowledged by our laws, are *menial servants*, so called from being *intra moenia*, or domestica. The contract between them and their masters arises from hiring. If the hiring be general, without any particular time limited, the law construes it to be hiring for a year. Upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not. But the contract may be made for any larger or smaller term.

Another species of servants are called *apprentices*, from *apprendre*, to learn. They are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art or mystery; but it may be done to husbandmen, nay to gentlemen and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to

\* Blackstone's Commentaries.

such persons as are thought fitting, who are also compellable to take them Apprentices to trades may be discharged on reasonable cause, either at their own or their masters' request, at the quarter sessions, or by one justice, with appeal to the sessions. By the equity of the statute, they may, if they think it reasonable, direct restitution of a proportion of the money given with the apprentice; and parish apprentices may be discharged in the same manner by two justices.

A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia*, as part of the family. Concerning whom good regulations have been made in various acts of parliament: 1. Directing that all persons who have no visible effects may be compelled to work. 2. Defining how long they must continue at work in summer and winter. 3. Punishing those who leave or desert their work. 4. Empowering the justices at the sessions, or the sheriff of the county, to settle their wages. And, 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

There is a fourth species of servants, if they may be so called, being rather in a superior or ministerial capacity; such as stewards, factors, and bailiffs, whom the law considers as servants *pro tempore*.

II. The manner in which this relation, of service, affects either the master or servant. And first, by hiring and service for a year, or apprenticeship under indenture, a person gains a settlement in that parish wherein he has served forty days. In the next place, persons serving an apprenticeship of seven years to any trade, have an exclusive right to exercise that trade in any part of England.

A master is permitted by the law to correct his apprentice for negligence or other misbehaviour, so it be done with moderation; though if the master or his wife beat any other servant of full age, it is a good cause of departure. But if any servant, workman, or labourer, assaults his master or his wife, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb. By service all servants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or according to the appointment of the sheriff or county quarter sessions, if labourers or servants in husbandry.

III. Let us inquire how strangers may be affected by the relation of master and servant, or how a master may conduct himself towards others on behalf of his servant, and what a servant may do on behalf of his master.

In the first place, then, the master may *maintain*, that is, abet and assist, his servant in any action at law against a stranger. Whereas, in general, it is an offence against public justice to encourage suits and



animosities, by helping to bear their expense, and is called in law, maintenance. A master may also bring an action against any man for beating or maiming his servant. But in such case he must assign, as a reason for so doing, his own damage by the loss of his service; and this loss must be proved upon trial. A master may likewise justify an assault in defence of his servant, and a servant in defence of his master. The master, because he has an interest in his servant—the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master.

All those things which a servant may do on behalf of his master, seem naturally to proceed on this principle, that the master is answerable for his servant's acts, if done by his command either expressly given or implied; for what he does by the agency of others, he is held to have done himself. Therefore, if the servant commit any trespass by his master's command or encouragement, the guilt lays on the master, who will also suffer the punishment due. But the servant is not thereby excused. For as he is a reasonable being, and accountable to God for his conduct, he is to obey his master only in all his lawful commands. If an innkeeper's servant rob his guests, the master is bound to restitution, as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery. So likewise, if a waiter at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master. Although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is, by implication, a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. But if I pay it to a clergyman's or physician's servant, who does not usually receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must fulfill the bargain, for this is the steward's business. A wife, a friend, a relation, who transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct. For the law implies, that they act under a general command; and without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust; for here is no implied order for the tradesman to trust my servant. But if I usually send him upon credit, or sometimes upon credit, and sometimes with ready money, I am answerable for all that he takes

up. For the tradesman cannot possibly distinguish when he comes by my orders, and when upon his own authority.

Lastly, if a servant by his own negligence, does any damage to a stranger, the master must answer for his neglect. If a blacksmith's servant lame a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehaviour.\*

## THE UNITED CHURCH OF ENGLAND AND IRELAND.

THE British constitution is composed of two distinct establishments. The one *civil* and the other *ecclesiastical*. Of the civil establishment we have already given copious details ; and we now proceed to explain the ecclesiastical branch. Of the latter there are three established churches; the churches of England and Ireland, which the 5th article of the Union declares to be for ever united, and the church of Scotland, of which we propose to treat separately. These ecclesiastical establishments, but especially the former, are so closely interwoven with the state, that the destruction of either must prove alike fatal to both. The connexion of the church with the state, is not designed to make the church *political*, but to preserve the state *religious*.

The government of the united church of England and Ireland is episcopal. She considers that a hierarchy in the church, like monarchy in the state, preserves a due gradation of rank and authority, and conduces to order and peace. That the episcopal government preserves the purity of the faith. That the authority of a bishop keeps heresy in awe, or speedily checks its progress. That ecclesiastical, like republican equality, obviously leads to contention and confusion. The clergy are the whole body of clerks or ecclesiastics, who are taken out from among the people as the Lord's lot or share, as the tribe of Levi was in Judea, and are separated from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the Christian religion. The preservation of both the civil and religious establishment is, therefore, the interest of every member of the community, and the especial duty of those to whose superintending care the general welfare is intrusted. But these establishments, though all persons have a common interest in their preservation, differ much in respect of the claims which they severally possess. The civil establishment has a legal title to duty and submission from every

\* Blackstone's Commentaries.

subject in the realm. Disaffection towards this part of the constitution, when manifested by outward acts, is a crime punishable by the severest penalties of the law. In return for the protection afforded by the civil government, the obligation of allegiance is contracted; an obligation which nothing can discharge, but the payment of the great debt of nature—which cannot be superseded by change of residence, or by the formation of new engagements—and which binds every one to whom it attaches, without exception, to submission, fidelity, and even to active exertion, whenever his exertions are wanted for the protection of his lawful government, or the security of his native soil. In a word, allegiance to the civil government is the positive and permanent duty of every person, whom birth has placed in a state of subjection to that government. To insinuate, therefore, that any one is deficient in a sense of this duty, or reluctant in its performance, is to cast a reproach upon him of the most disgraceful nature. But the case is very different with regard to the ecclesiastical part of the constitution. The law of the land leaves every one at liberty to separate from the established church, without being subject to any kind of penalty, censure, or reproach. That church has indeed high and transcendent claims, but they are not of a temporal nature, nor are they supported by temporal sanctions. Considered merely as a national establishment—as a part of the constitution—it claims only to be entitled to provision for its worship and its ministers, and to protection against all other religious professions. This is the extent of its engagement with the civil magistrate; who, on his part, on entering into such an engagement, has no other object but to keep alive a sense of religion, with a view to the well-being of society. Beyond this the province of the civil magistrate does not extend. It is his duty to support a religious establishment, in order to preserve his people from the fatal effects of irreligion. An established church carries religion to the most remote corner of the land. It carries it into the palace of the monarch, and the cottage of the peasant. The land pays the expense, and the poor man enjoys the benefit without money and without price. But it is also his duty to remember, and in this country he does remember, that religion is a concern between God and the soul, in which he is not made an arbiter; and that it does not belong to *human* authority to judge for man in such matters, or to restrain him from worshipping God according to the dictates of his own conscience.

But the established church of England possesses a far higher character than that of an establishment. A character which seems to be entirely overlooked by those persons who separate from her communion, who frequently explain and attempt to justify their separation, on the ground that they vindicate their religious freedom by dissenting from a church, which, being established by the authority of the civil magistrate, presumes,

as they say, under that authority, to prescribe a common standard of faith and worship. Whilst, however, to such persons the established church appears only as a temporal institution, as a mere creature of the state, she is essentially a *spiritual society*, and *as such*, she claims to be a part of that kingdom, which its founder and sovereign declared to be "not of this world." To be a genuine branch of that church, which for ages after its institution subsisted independently of the civil power, and which has the assurance of its divine Master and Head, "that the gates of hell shall not prevail against it." It is in this character, that is to say, as a *church* and not as an *establishment*, that she offers herself as a guide to faith and worship. She claims, for that purpose, the authority of a spiritual commission from Christ himself. Her alliance with the state is purely incidental. That alliance is, indeed, marked by internal symbols of an imposing nature. It invests her superior clergy with rank and dignity. It seats her bishops among the peers of the realm. It allots the most durable and magnificent edifices to the celebration of her worship. It binds the very soil to furnish a provision for her clergy. It not only endows her with revenues, but invests her with temporal authority in her ecclesiastical courts. But these are merely adventitious circumstances, indicative indeed of her character as an *establishment*, but wholly independent of her character as a *church*. They may cease to exist, nay, her alliance with the state may be entirely dissolved, while her faith and worship, her ordinances and discipline, which are her essentials as a church, will undergo no change. Such was the case at the time of the grand rebellion under Cromwell, when the church establishment was overthrown, but the church itself continued to exercise, as before, all her spiritual functions, though under circumstances of great embarrassment, and after a while she was reunited to the state, and was again invested with secular appendages. An exact model of what she was, during this period of separation, and of what she would again be, were such a separation to occur, may be seen at the present day in the episcopal churches of Scotland and North America. Each of which acts under the same authority, professes the same faith, maintains the same discipline, and observes the same liturgical forms, as the established church of England.

When, therefore, the established church promulgates a rule of faith and worship, it is to be remembered that she acts, not in her temporal and incidental character, as an establishment, but in her spiritual, appropriate, and permanent character, as a church. In which character she claims to be a divinely appointed guide, duly authorized by virtue of an apostolical commission, to show to the people of this land "the way to salvation." Surely then, it behoves those who separate from her communion, to examine well the grounds on which such a claim is founded.

For if the church be really a divine institution, separation from it cannot fail to involve an awful responsibility. The freedom allowed, by law, in this country, to every one to worship God according to the dictates of his conscience, can extend no farther than freedom from *human* control, in the choice and exercise of religion. But whilst in religious worship man is, and ought to be, unrestrained by man, yet he is bound, in this respect, as in every other, to obey God. It is his duty to worship God, as God has appointed to be worshipped. Conscience, instead of finding an excuse for disobedience to the divine will, is itself subject to that will, and must be informed and regulated by it. If, therefore, God has instituted a church, in the which it is his pleasure to be worshipped, it cannot be a matter of indifference whether a man worship in that church, or wander from it.\*

It may not, therefore, be uninteresting to recapitulate, as briefly as possible, the first introduction of Christianity into England; and at same time to show the origin, corruption, and reformation of its church.

It is allowed on all hands, that Christianity was received in England during the lives of the apostles. Eusebius says, that "some of the apostles passed over the ocean to those which are called the British islands." In another place, the same author affirms, that "some of the apostles preached the gospel in the British islands." Theodoret, another ancient and learned author, says, that "St Paul brought salvation to the islands that lay in the ocean." That Britain is meant by this expression, seems clear, from his having mentioned Spain and Gaul in connexion with it. The latter being only divided from the "islands that lie in the ocean" by a narrow channel. He also says, that St Paul, after his release at Rome, carried the light of the gospel to other nations." Again, that "St Paul, after his imprisonment, preached the gospel in the Western parts." Here the British islands are to be understood. This assertion is corroborated by the testimony of Clemens Romanus, who says that "St Paul preached righteousness through the whole world, and in so doing went to the utmost bounds of the West." At the time when Clement flourished, "whose name is written in the book of life,"† Britain was undoubtedly the "utmost bounds of the West." It is called "*ultimam occidentis insulam*," by all the ancient Roman writers. In fixing the boundaries of the gospel, Arnobius mentions the Indies as the eastern, and Britain as the extreme western boundaries. Gildas, the oldest British historian, affirms, "on sure grounds and certain knowledge," that St Paul constituted the church in Britain "in the time of Tiberius Cesar." The emperor Tiberius died in the year of Christ 39, according to Cardinal Baronius, the great

\* Claims of the Established Church.

† Phil. iv. 3.

Roman chronologer. In another place Gildas also says, that "the gospel was received here before the fatal defeat of the Britons by Suetonius Paulinus." This defeat happened in the seventh year of the emperor Nero. St Paul being then at liberty after his imprisonment at Rome, had sufficient time and convenience to have settled a church in Britain. In one of his epistles, St Jerome says, that "France, and Britain, and Africa, and Persia, and the East, and India, and all barbarous nations, adore one Christ, and observe *one rule of truth*." Venantius, in his Life of St Martin, says,

St Paul did pass the seas, where Ise  
Makes ships in harbour stand,  
Arriving on the British coast,  
And cape of Thule land.

It appears, then, that the Christian faith was introduced, and a church planted in South Britain, now called England, by St Paul, the great apostle of the Gentiles. It is unreasonable to suppose that he would settle a different order of church government in Britain than he had established everywhere else. We have Jerome's testimony, that every country observed the *same rule of truth*. All the churches planted by the apostles were in full communion with each other. All "continued steadfastly in the apostles' doctrine and fellowship, and in breaking of bread, and in prayers." While the Roman empire stood, the intercourse between every part of it was easy and frequent, and therefore any difference in doctrine or discipline could be easily ascertained. But we read of none. We must conclude, therefore, that the government of the British churches would be the same as the churches of all other countries, with whom they were in full communion. "This government," says Dr Lloyd, a learned antiquary, "was unquestionably a diocesan episcopacy, not only in name, but in authority, the same as is now in these kingdoms."\* We see, then, that a branch of the Christian church was introduced into Britain by the apostle Paul. Bishops descending from him sat in some of the earliest councils. At the council of Arles, in France, in the year 314, Restitutus, bishop of London, with two other bishops, sat and subscribed the canons. This council was held soon after the tenth general persecution, and before there could be any of those temptations of secular greatness, which are said to have introduced corruptions, and altered the primitive government of the church. There were some British bishops present at the council of Sardica, in the year 347, and also at the council of Ariminum.

After the final departure of the Romans, the ancient British were reduced to great distress by their warlike neighbours in the north. They

\* Dr Lloyd's Historical Account of Church Government, as it was in Great Britain and Ireland, when they first received the Christian religion.

imprudently invited the Saxons into the kingdom to assist them. The Saxons were heathens. They drove back the Picts, but they made themselves masters of the country of their allies. They massacred the greater part of the Britons, and the survivors took shelter in Wales. The Britons in Wales continued Christians, and their church was in a very flourishing condition in the year 596. In that year, Gregory the Great, bishop of Rome, sent Augustine and forty monks into Kent, for the purpose of converting the Saxons, who were pagans, to the Christian faith. The constant hostilities which the Saxons maintained against the Britons, would create an aversion to receiving Christianity from them. Ethelbert, king of Kent, had married Bertha, daughter of Caribert, king of Paris, and a Christian; so that Augustine did not experience so much difficulty as might have been expected. Ethelbert, well disposed himself towards Christianity, assigned the missionaries a habitation in the isle of Thanet. This favourable reception encouraged Augustine to preach the gospel to the Saxons, which he and his successors did with such success that the greater part of the Saxons were converted in the course of seventy years. Augustine went over into France, and received consecration from the archbishop of Arles. Gregory had appointed him archbishop of Canterbury, when he despatched him from Rome. At this time, the British church was confined to Wales. Augustine proposed to the British bishops that they should acknowledge the Roman pontiff as their head: this they peremptorily declined to do. The British church maintained its independence on Rome for many years. For 1100 years the British bishops were elected and consecrated by their own bishops, without any connexion with Rome or Canterbury. "Always," says Giraldus Cambrensis, "until the full conquest of Wales by Henry I., the bishops of Wales consecrated the archbishop of St David's, and he likewise was consecrated by the other bishops his suffragans, without professing any manner of subjection to any other church." There was no difference in faith, in doctrine, or in discipline, between the British and the Saxon churches, their dispute was solely about the supremacy of the bishop of Rome. Parsons, the Jesuit, allows, "that the faith which St Austin brought, and that which the Britons had before, must needs be one and the self-same in all material and substantial points." When Henry I. subdued Wales to the dominion of the crown of England, he also subjected the ancient British church to the supremacy of Rome. From this time the British merged into the Anglo-Saxon church, and remained in subjection to Rome till the Reformation. If the Saxons had happily received their Christianity from the Britons, the Romish slavery might have been avoided.

Ethelbert endowed the see of Canterbury with large revenues. He likewise established the dioceses of Rochester and London. The other

kings of the heptarchy followed his example, and erected bishoprics equal in extent with their kingdoms. This in some measure accounts for the unequal size of the dioceses, which were of the same extent as the dominions of their respective kings. The bishops became their councillors, and were always summoned to take part in the national councils. This is the origin of the connexion between church and state, and of the infusion of a Christian spirit into the legislature. For many years this connexion subsisted with much harmony. But after the moral world was subdued, and the papal tyranny completely established, the popes soon discovered, that to secure their own dominion, it was necessary to sever the alliance which had hitherto subsisted between the church and the state. They represented the church as independent, and its head to be the pope. His creatures struggled hard to maintain this disunion, but many and severe were the repulses the papal power met with in England, and many laws were enacted to restrain his usurped power. His usurpations were continued till the year 1535, a period of 940 years, when the clergy, the monarch, and the people, could bear his tyranny no longer. Henry VIII. threw off the yoke, declared that the pope was not the head of the church of England, but that the king, as in times past, was supreme governor over all persons, and in all causes, ecclesiastical as well as civil.

This was the first step towards a reformation. The bishops Cranmer, Ridley, Latimer, and others, are not the *founders* of the church of England; they are only her *reformers*. They corrected all the errors in doctrine, which during an usurpation of nine centuries the church had imbibed from popery. They condemned the doctrine of transubstantiation, the worship of saints and images, communion in one kind, and the constrained celibacy of the clergy. They thus restored the church to its original state of purity and perfection. "They did not," says Mr Hook, "attempt to make a new, their object was to *reform*, the church. They stripped their venerable mother of the meretricious gear in which superstition had arrayed her, and left her in that plain and decorous attire with which, in the simple dignity of a matron, she had been adorned by apostolic hands."\* The church of England can trace her origin up through the apostles to our Saviour himself. To use the words of Mr Palmer, "the orthodox and undoubted bishops of Great Britain and Ireland are the only persons who in any manner, whether by ordination or possession, can prove their descent from the ancient saints and bishops of these isles. It is a positive fact, that they, and they alone, can trace their ordinations from Peter and Paul through Patrick, Augustine, Theodore, Colman, Columba, David, Cuthbert, Chad, Anselm, Osmund, and all the other worthies of our church."†

\* Hook's Sermon on the Church.

† Origines Liturgicæ, ii. p. 252.



At the Reformation, therefore, the church of England returned to the state of purity which she enjoyed previous to the usurpation of the bishop of Rome. There was no *new* church formed, the reformers restored the *old* one, swept and garnished from the rubbish of Roman superstition. The church did not introduce a *new* religion, she only revived the *old*. It has been frequently asked where the protestant religion was before the Reformation, and it has been as appropriately answered, in the Bible, where it is now, and where alone all true religion is to be found. The protestant church of England is more ancient than the modern church of Rome, and their accusing the church of England of being heretics is a bold and groundless charge, which she justly despises and protests against. For "after the way which they call heresy," the church of England "worships the God of our fathers, believing all things which are written in his holy word."

The essentials of faith, distinctly considered, are most advantageously taught, and most securely preserved, in the form of creeds. Such forms are calculated not only to inculcate a knowledge of the faith, by exhibiting in one point of view its leading and fundamental articles, but also to mark the important boundary between *fundamental* doctrines and such as are *not* fundamental. They serve, moreover, as standing records of primitive doctrine, to guard the pure faith from adulteration. Still following the example of the primitive church, the church of England has in this manner declared its faith, by the adoption of three creeds; which she receives and teaches on the sole authority of the word of God. Though successively introduced, these creeds were all in general use in the primitive church, and two of them were meant to counteract certain alarming corruptions of the Christian doctrine. In which point of view it cannot be denied, that they are now to the full as necessary as ever.

Besides the adoption of creeds, for the inculcation and preservation of its fundamental doctrines, the church of England has also deemed it necessary to frame articles of religion, upon points both fundamental and not fundamental. And she pursues with regard to these different classes of doctrine, a course which corresponds precisely with their respective importance. It is peculiar to fundamental doctrines, that a belief in them is essential to salvation. It is therefore of the first importance not merely to teach these doctrines systematically as fundamental articles of the Christian faith, (which is the object in the creeds,) but also by a more precise exposition than creeds are calculated to convey, to guard them against error:—for, in such cases, error is heresy. The church has endeavoured to effect this object by the articles, which explain its doctrines on fundamental points, in terms so clear and explicit, as to be susceptible of no latitude of construction, and to leave no room for difference of

opinion. It is also the effect of such precision to bar the door against controversy. No controversy upon fundamental points can possibly arise among those who conscientiously sign the thirty-nine articles. But non-fundamental doctrines are of a subordinate importance. They are not among the essentials of the Christian faith. Differences of opinion, with regard to these, though liable to the imputation of error, do not authorize the charge of heresy. In the exposition of these doctrines, therefore, the church of England, instead of employing the same precision of language, as in the other case, declares its faith in terms which do not preclude a difference of construction, and confines itself as nearly as possible to the general language of Scripture. By pursuing such a course, it enables persons, who differ from each other in their views upon such subjects, alike to subscribe these articles. It seems indeed to have been the anxious wish of those eminent divines and reformers who framed the articles, that none who agree with the church in fundamentals should be kept out of its communion by differences upon points of minor importance. But the generality of expression thus employed, with regard to such points, left the subject open to controversy. In order, however, to guard against such a result, an express declaration has been prefixed to the articles in the form of a preamble. It states that they were agreed upon for the "avoiding of diversities of opinion, and for the establishing of consent, touching true religion."\*

"Confessions of faith are necessary. They ought never to be ambiguous; but also they ought not to be too minute, and still less ought they to maintain the uncharitable and exclusive spirit of a party. The church of England asserted in her articles the great truths of religion, and bore her testimony against the popish and other leading errors of the day. *But she bears no name*, and above all, she is not actuated, in such her code of doctrine, by the partial spirit of any sect. She asserts the truth as she holds it,—such as men of very various views in matters of detail, and in modes of explanation may entertain, without disturbing the public peace and the church's unity. The church is the spouse of Christ, his mystical body; and every sound branch of it is the common and impartial parent of Christians, not the fondling or fosterer of a party. This character of perfect *impartiality*, belongs remarkably to the church of England. She has opened her arms as wide as the character of a faithful witness of the truth permits, in order to embrace all who, with many differences of sentiment, agree in the essential truths of sound religion."†

It is not, however, so much to the Articles as to the Liturgy, that the members of the church of England *in general* are to look for an exposi-

\* Claims of the Established Church.

† Dr Walker's Life of Archbishop Whitgift.

tion of its doctrines. The former, important as is their object, are of limited application, being intended only for the consideration of the comparatively few, who in different situations may be called upon to subscribe them. But the liturgy is intended for *general* use. Its creeds are to be repeated by *every* member of the church. *All* its members are required regularly to join in its forms of worship, and to participate in all its ordinances. In the liturgy, then, whatever the church deems it necessary for a Christian to believe or to practise, is to be found incorporated with its congregational services, and familiarized in its forms of devotion. In short, it is to the liturgy of the reformed church, that its members are chiefly to look for its interpretation of Scripture upon all points of vital importance. The great pains taken by the reformers in framing and revising the liturgy, were proportioned to the vast importance of the object. This work engaged the assiduous attention of successive committees of bishops and other learned divines for many years, who, taking the Scriptures for their guide, and the primitive church for their model, carefully retained the services which had been in use in the church, and rejected the superstitions which had been superadded thereto by the church of Rome. After undergoing many revisions, the Book of Common Prayer, in its present form, was the result of the labours of these pious and learned men, and its production is to be considered as the deliberate act of the church in its collective capacity; as upon its completion, it received the unanimous sanction, and indeed the actual signature of both houses of convocation.

The prayers of the church of England are generally of great antiquity. Many of them are copied literally from the oldest liturgies, and the rest are formed upon their model. And it is worthy of remark, that the collects, (prayers,) with their epistles and gospels, are proved from many concurrent testimonies, to have been used on the same Sundays and holidays to which they are now appropriated, for above thirteen hundred years. The *Te Deum* and other hymns are of no less ancient usage. That which is called the Apostles' Creed, if it was not drawn up by the apostles themselves, seems, the greatest part at least, to have been extant in their times; for most of its articles are to be found in the epistles of Ignatius, a disciple of St John. This is mentioned simply, because if *antiquity* be ever allowed to set the stamp of authority, it must be more particularly in the institutions of religion. In which the nearer we can approach to the days of the apostles, the better we may hope to retain the pure and uncorrupted ordinances of the church of Christ.\*

The Liturgy, or Common Prayer of the Church of England, as the

\* Claims of the Established Church.

sacred echo of the Holy Scriptures, repeats all the truths of revelation. In it the people confess that there is no health in them, and pray that they may be restored to spiritual health. They are assured that the Almighty desireth not the death of a sinner, but rather that he may turn from his wickedness and live. They are taught that God has given his ministers power to declare, that He pardoneth all that truly repent, and unfeignedly believe his holy word. In it they acknowledge God to be the Lord, the Father of an infinite majesty; the honourable, true, and only Son; and also the Holy Ghost, the Comforter. By it they pray to God to help his servants whom he hath redeemed. He is there owned to be the Author of peace, and that in the knowledge of him standeth our eternal life. He is petitioned to send down upon us the healthful Spirit of his grace, and to pour upon us the continual dew of his blessing. They declare that from him all holy desires, all good counsels, and all just works do proceed. By it they implore deliverance from all dangers, ghostly and bodily. They entreat salvation by the means of his appointment; and they beseech him to hear them, and to bestow all things that be needful both for their souls and bodies. By the liturgy they praise him for the noble works which he did in old time. They declare that they put their whole trust and confidence in his mercy. They beg that he will make his ways known unto all men; and that he will lead all who call themselves Christians into the way of truth. In it he is thanked for his loving-kindness, and blessed for creation and preservation, but above all for redemption, and for the means of grace. He is besought to give us such a sense of all his mercies that we may be unfeignedly thankful, and shew forth his praise not only with our lips, but in our lives. And finally, by the liturgy they give glory to the Father, Son, and Holy Ghost, for all the hopes entertained, for all the blessings enjoyed, and for all the wonders that have been wrought on our account.\*

But, to use the language of the pious Mr T. G. Taylor, it is not for its antiquity alone that I respect and venerate the public worship of the church. I am struck with its excellence; I admire the beauty, the order, the fitness of the whole service; and to me it appears to bear internal marks of its divine original; for it approaches nearest to the sublime simplicity and inspiration of Scripture. I know not any human composition which in chastity, in grandeur, in energy, in sublimity of thought, in simplicity of expression, can be compared to the established liturgy of the church of England. There is in its prayers such chastened and sober dignity, such unaffected humility, such a sanctity befitting the temple of God, such fire of devotion, such inspiration of faith, hope, and charity,

\* Writer in the *Edinburgh Ecclesiastical Journal*, vol. ii. p. 13.

such conciseness and yet such fulness, that nothing short of inspiration has ever attained to so near a resemblance of that perfect form of prayer, which our divine Master has left us for our use, and for our pattern. But I had rather speak on the authority of others than offer opinions of my own. Though all churches in the world, says Dr Comber in his *History of Liturgies*, have and ever had forms of prayer, yet none was ever blessed with so comprehensive, so exact, and so inoffensive a composure as ours; which is so judiciously contrived, that the wisest may exercise at once their knowledge and their devotion; and yet so plain, that the most ignorant may pray with understanding. So full, that nothing is omitted which is fit to be asked in public; and so particular, that it compriseth most things which we would ask in private; and yet so short, as not to tire any that hath true devotion. Its doctrine is pure and primitive; its ceremonies so few and innocent, that most of the Christian world agree in them. Its method is exact and natural, its language significant and perspicuous; most of the words and phrases being taken out of the Holy Scriptures, and the rest are the expressions of the first and purest ages; so that whoever takes exception at these, must quarrel with the language of the Holy Ghost, and fall out with the church in her greatest innocence. In the opinion of the most impartial and excellent Grotius, (who was no member of, nor had any obligation to that church,) the English liturgy comes so near the primitive pattern, that none of the reformed churches can compare with it.

Many well meaning people, from ignorance, imagine that the church of England rests wholly on the outward forms of religion, and entirely throws off all inspiration of the Holy Spirit. I will therefore briefly state what sort of inspiration she allows and prays for. She constantly teaches that all the saving graces are wrought in our hearts by the inspiration of the Holy Ghost. So much so, that of ourselves we are not able so much as to think a good thought. That this inspiration is as necessary to our bringing forth good works, as the influence of the sun is, in producing the fruits of the earth. That whatever may bear the appearance of good works in us, which is not wrought by this inspiration, is neither good nor acceptable to God. "Works done before the grace of Christ and the *inspiration* of his Spirit, are not pleasant to God—yea rather for that they are not done as God hath willed and commanded them."\* The first question demanded by the bishop in the ordering of deacons, is, Do you trust that you are inwardly moved by the Holy Ghost, to take upon you this office? The same is demanded in the ordination of priests and bishops; and in consecrating a bishop, the officiating bishop says, "Receive the Holy Ghost for the office and work of a bishop in the church of God." To specify every place where the inspiration of the Holy Spirit

\* Art. xiii.

is witnessed and prayed for, would require the whole liturgy to be transcribed. The whole of which shows the doctrine of the church of England to be, that the *inward* is the soul of religion, without which the *outward* form is but a dead carcase, and is offensive to God. In the exhortation before the communion, she earnestly inculcates upon all her members, that if they be not thus spiritually prepared, all the *outward* ordinances will avail nothing: "for otherwise the receiving of the holy communion doth nothing else but increase your condemnation." It is certain that set forms of prayer were commanded, and even dictated by God to his ancient people the Jews, were enjoined by our Saviour himself, were practised by the apostles and the primitive church, some of whose liturgies are still extant. The inspired author of the Apocalypse asserts that the church triumphant "rest not day and night to give glory, and honour, and thanks, to him that sat on the throne," by a set form of words, the noise of whose voices was "as it were the voice of a great multitude, and as the voice of many waters, and as the voice of mighty thunderings."

The doctrine of the church of England is in all respects catholic and orthodox. The Nicene or Constantinopolitan creed is inserted into the most solemn office of her liturgy. What the four first general councils adjudged to be heresy, she holds to be so also. Besides the creeds, which every man repeats, the clergy subscribe the Thirty-nine Articles of Religion. As Bishop Jewell's Apology is justly esteemed an authority, I here transcribe his chapter "containing the doctrine received in the church of England."

"1. We believe that there is one certain nature and divine power, which we call God, That this is distinguished into three equal Persons, the FATHER, SON, and HOLY GHOST; all of the same power, of the same majesty, of the same eternity, of the same divinity, and of the same substance. And although these three persons are so distinguished, that the Father is not the Son, nor the Son the Holy Ghost or the Father, yet there is but ONE GOD. That this One God created heaven and earth, and whatever is contained within the circumference of the heavens.

"2. We believe that Jesus Christ, the only Son of the eternal Father, as it had been decreed before the beginning of all things, when the fulness of time came, took our flesh and perfect human nature of that blessed and pure Virgin, that he might reveal to men that hidden and secret will of his Father, which was concealed from all former ages and generations. And that in this human body he might finish the mystery of our redemption, and might nail our sins to his cross, and the obligation which lay against us.

"3. For we believe that for our sakes he died, was buried, descended into hell, and the third day by a divine power returned to life, and arose, and after forty days, in the sight of his disciples, ascended into heaven, that he might fill all things, and that the very body in which he was born, in which he conversed, in which he was despised, in which he had suffered most grievous torments, and a most direful death, in which he rose and now ascended to the right hand of his Father, was placed above all principalities and power, and every name which is mentioned, not only in this world, but in that which is to come, in majesty and glory. And we believe that he doth now sit there, and shall sit there till all things are fulfilled. And although the majesty and divinity of Christ is diffused everywhere, yet his body ought to be in one place. We believe that although Christ added majesty to his body;

yet he took not from it the nature of a body. Nor is Christ to be so asserted to be God, that we should deny him to be man also.

"4. And from thence we believe Christ shall return to exercise a general judgment, as well upon those he shall then find alive, as upon all that are then dead.

"5. We believe that the Holy Ghost, who is the Third Person in the Holy Trinity, is true God, not made, nor created, nor begotten, but proceeding from both, that is, from the Father and the Son, in a way neither known to mortals, nor possible to be expressed by them. We believe that it is he who softens the hardness of man's heart, when he is received into their hearts by the saving preaching of the gospel, or by any other way whatsoever: that it is he who enlightens them, and leads them to the knowledge of God, into all the ways of truth, into a perfect newness of life, and a perpetual hope of salvation.

"6. We believe that there is one church of God. That it is not confined as it was heretofore to the Jewish people in one angle or kingdom, but that it is *catholic* and *universal*, and so diffused or spread over the face of the whole earth, that there is no nation which can justly complain that it is excluded, and cannot be admitted into the church and people of God. That this church is the kingdom, the body, and spouse of Christ. That Christ is the only prince of this kingdom. And that there is in the church divers orders of ministers. That there are some who are *deacons*, others who are *presbyters*, and others who are *bishops*, to whom the instruction of the people, and the care and management of religion is committed. And yet there neither is, nor is it possible there should be, any *one* man who has the care of this whole catholic church, for Christ is ever present with his church, and needs not a vicar, or sole and perfect successor. And that no mortal man can in his mind contain all the body of the universal church, that is, all the parts of the earth, much less can he reduce them into an exact order, and rightly and prudently administer its affairs. That 'the apostles,' as St Cyprian saith, 'were all of equal power and authority, and that all the rest were what St Peter was. That it was said to all alike, Feed: to all, Teach ye the gospel.' And that as St Jerome saith, 'all bishops, wheresoever they are settled, whether it be at Rome or Eugubium, at Constantinople or Rhegium, they are of equal worth, and of the same priesthood.' And as St Cyprian saith, 'there is but one episcopacy, and each of them hath a perfect and entire share of it.' And that according to the judgment and sentence of the council of Nice, the bishop of Rome hath no more authority in the church than the other patriarchs of Alexandria and Antioch. That the bishop of Rome who now endeavours to draw all the ecclesiastical authority to himself alone, if he doth not his duty, that is, if he doth not administer the sacraments, if he doth not instruct the people, admonish and teach, he is not to be called a bishop, or indeed a presbyter. For as St Augustine saith, 'bishop is the name of a work or office, and not a title of honour:' so that he that would usurp an unprofitable pre-eminence in the church is no bishop. But then that the bishop of Rome or any other person should be the head of the whole church, or an universal bishop, is no more possible, than that he should be the bridegroom, the light, the salvation, and the life of the church. These are the privileges and titles of Christ alone, and do properly and only belong to him. But the bishop of Rome, because he now desires to be so called, and usurps a power which belongs not to him, besides that he acts directly against the ancient councils and the fathers, if he dares believe St Gregory, one of his own predecessors, he has taken upon him an arrogant, profane, sacrilegious, antichristian title. He is therefore the king of pride, *Lucifer*, one that sets himself above his brethren, who has denied the faith, and is thereby become the forerunner of antichrist.

"7. We say that a minister ought to have a lawful call, and be duly and orderly preferred in the church of God, and that no man ought at his own will and pleasure to intrude into the sacred ministry.

"8. We say that Christ has given to his ministers the power of binding and loosing, of opening and shutting. And we say that the power of loosing consists in this, that the minister, by the preaching of the gospel offers to dejected minds and true penitents, through the merits of Christ, absolution; and doth assure them of a certain remission of their sins, and the hopes of eternal salvation. Or secondly, reconciles, restores, and receives into the congregation and unity of the faithful, those penitents, who by any grievous scandal, or known

and public offence, have offended the minds of their brethren, and in a sort alienated and separated themselves from the common society of the church and the body of Christ. And we say the minister doth exercise the power of binding or shutting, when he shutteth the gate of the kingdom of heaven against unbelievers and obstinate persons, and denounceth to them the vengeance of God and eternal punishment; or excludeth out of the bosom of the church, those that are publicly excommunicated. And that God himself doth so far approve whatever sentence his ministers shall so give, that whatsoever is either loosed or bound by their ministry here on earth, he will in like manner bind or loose, and confirm in heaven. The key with which these ministers do shut or open the kingdom of heaven, we say with St Chrysostom, is 'the knowledge of the Scripture:' with Tertullian, is the 'interpretation of the law;' and with Eusebius, is the 'word of God.' We say the disciples of Christ received this power from him, not that they might hear the private confessions of the people, and catch their whispering murmurs, as the popish priests everywhere now do, but that they might go and preach and publish the gospel, that so they might be a savour of life unto life to them that did believe, and that they might also be a savour of death unto death to those that did not believe: that the minds of the pious who were affrighted with the sense of their former ill lives and errors, after they beheld the light of the gospel and believed in Christ, might be opened by the word of God, as doors are with a key. And that the wicked and stubborn, who would not believe and return into the way, might be left shut up and locked, and as St Paul expresses it, might 'wax worse and worse.' This we take to be the meaning of the keys; and that in this manner the consciences of men are either bound or loosed. We say that the priest is a judge, but then we say that he hath not the right of any dominion.

"9. We say marriage is honourable and holy in all degrees of men; in patriarchs, in prophets, in apostles, in holy martyrs, in the ministers of the churches, and in the bishops. And we say as Sozomon did of Spiridion, and Nazianzen of his own father, 'that a pious and industrious bishop is nothing the worse for being married, but rather much the better, and more useful in his ministry.' And we say that the law, which by force taketh away this liberty from men, and ties them to a single life against their wills, is as St Paul styles it, *the doctrine of devils*.

"10. We receive and embrace all the canonical Scriptures both of the Old and New Testament. We give our gracious God most hearty thanks, that he hath set up this light for us, upon which we ever fix our eyes, lest by any human fraud, or the snares of the devil, we should be seduced to errors or fables. We own them to be the heavenly voices by which God hath revealed and made known his will to us. In them only can the mind of man acquiesce. In them all that is necessary for our salvation is abundantly and plainly contained. They are the very might and power of God unto salvation. They are the foundations of the apostles and prophets, upon which the church of God is built. They are the most certain and infallible rule by which the church may be reduced, if she happen to stagger, slip, or err; by which all ecclesiastical doctrines ought to be tried. No law, no tradition, no custom, is to be received or continued, if it be contrary to Scripture. No, not though St Paul himself, or an angel from heaven, should come and teach otherwise.

"11. We receive also and allow the sacraments of the church. That is, the sacred signs and ceremonies which Christ commanded us to use, that he might by them represent to our eyes the mysteries of our salvation, and most strongly confirm the faith we have in his blood, and seal his grace in our hearts. We call them *figures, signs, types, antitypes, forms, seals, prints or signets, similitudes, examples, images, remembrances, and memorials*. Nor do we doubt, with all the ancient fathers, to call them a kind of *visible words, the signets of righteousness, and the symbols of grace*. We clearly affirm, that in the sacrament of the Lord's supper, the body and blood of our Lord is truly exhibited to believers. That is, the enlivening flesh of the Son of God; the bread that comes from above, the nourishment of immortality, the grace, the truth, and the life. That it is the communion of the body and blood of Christ, by the participation of which we are quickened, strengthened, and fed to immortality, and by which we are conjoined, united, and incorporated with Christ, that we may remain in him and he in us.



"12. We acknowledge that there are two sacraments, properly so called—*Baptism* and *the Supper of the Lord*. For so many we see delivered to us, and consecrated by Christ.

"13. And we say, that *baptism* is the sacrament of the remission of sin, and of that washing which we have in the blood of Christ; and that none are to be denied that sacrament who will profess the faith of Christ; no, not the infants of Christians, because they are born in sin, and belong to the people of God.

"14. We say that the *eucharist* is the sacrament or visible *symbol* of the body and blood of Christ, in which his death and resurrection, and what he did in his human body, is, in a manner represented to our eyes, that we may give him thanks for his death and our deliverance by it; and that by frequenting the sacrament we may often renew the remembrance of it, and that by the body and blood of Christ we may be nourished into the hope of the resurrection and of eternal life; that we may be assured that the body and blood of Christ hath the same effect in the feeding of our souls, which the bread and wine have in repairing the decays of our bodies.

"15. We say the *bread* and *wine* are the holy and heavenly mysteries of the body and blood of Christ; and that in them, Christ himself, the true bread of eternal life, is so exhibited to us as present, that we do *by faith* truly take his body and blood; and yet at same time we speak not thus so as if we thought the *nature* of the bread and wine were totally changed and abolished, as many in the last ages have dreamt, and as yet could never agree among themselves about this dream. For neither did Christ ever design that the wheaten bread should change its nature, and assume a new kind of divinity, but rather that it might change us. For what can be more perspicuous, than what Christ said not only after the consecration, but after the finishing of the communion: *I will drink no more of the fruit of the vine*. It is certain the fruit of the vine is wine and not blood. And yet when we speak thus, we do not so depress the esteem of the Lord's supper as to teach that it is a mere cold ceremony, and that nothing is done in it. We assert that Christ in his sacraments doth exhibit himself truly present in *baptism*, that we may put him on; in *his supper*, that we may eat him by faith and in the spirit, and that by his cross and blood we may have life eternal. This we say is not slightly and coldly, but really and truly done: for although we do not touch Christ with our teeth and lips, yet we hold and press him by faith, mind, and spirit. Neither is that faith vain which embraces Christ, nor that participation cold, which is perceived by the mind. So is Christ himself entirely offered and given to us in these mysteries, as much as is possible, that we may truly know that we are flesh of his flesh, and bone of his bone. That he dwells in us, and we in him.

"16. And therefore, in the celebration of these mysteries, before we come to receive the holy communion, the people are fitly admonished to *lift up their hearts*; and that they should direct their minds to heaven; for there he is, by whom we are to be fed and live.

"17. But then as to the fairs and sales of masses, and the carrying about and adoring the bread, and a number of such-like idolatrous and blasphemous follies, which none of them dare affirm to have been delivered to us by Christ or his apostles, our church will not endure them. Origen saith, 'Christ is the priest, and the propitiation, and the sacrifice; and this propitiation comes to every one by the way of faith;' and therefore, agreeably hereunto, we say that the sacraments do not profit the living without faith, and much less the dead. As to purgatory, though it is not a very late invention, yet it is nothing but a silly old wives' story.

"18. We know that St Augustine grievously complained of the vast number of impertinent ceremonies in his time; and therefore we have cut off a great many of them, because we know they were afflictive to the consciences of men, and burdensome to the church of God. Yet we still retain, and religiously use, not only all those which we know were delivered to the church by the apostles, but some others which we saw might be borne without inconvenience; because, as St Paul commands, we desire all things in the religious assemblies should be *done decently and in order*. As to all those which were very superstitious or base, or ridiculous, or contrary to the Scriptures, or did not seem to befit sober men, an infinite number of which are still to be found amongst papists, we have rejected all these, without excepting any one of them, because we would not have the service of God any longer contaminated with such fooleries.

" 19. We pray (as it is fit we should) in that tongue our people do all understand, that the people, as St Paul admonisheth, may reap a common advantage by the common prayers.

" 20. We have no mediator and Intercessor by whom we approach to God the Father, but Jesus Christ, in whose name *only* all things are obtained.

" 21. We say that man is born and does live in sin; and that no man can truly say his heart is clean. That the most holy man is an unprofitable servant. That the law of God is perfect, and requires of us a full and perfect obedience; and that we cannot in any way keep it *perfectly* in this life. That there is no mortal who can be justified in the sight of God by his own deserts; and therefore our only refuge and safety is in the mercy of God the Father by Jesus Christ; and in the assuring ourselves that he is the propitiation for our sins, by whose blood all our stains are washed out. That he has pacified things by the blood of his cross. That he, by that only sacrifice which he once offered upon the cross, hath perfected all things; and therefore, when he breathed out his soul, said, *IT IS FINISHED*; as if by these words he would signify, Now the price is paid for the sins of mankind.

" 22. Now if there be any who think not that this sacrifice is sufficient, let them go and find out a better: but as for us, because we know this is the only sacrifice, we are contented with it alone, nor do we expect any other.

3. Though we say there is no trust to be put in the merits of our works and actions, and place all the hopes and reason of our salvation only in Christ; yet we do not therefore say that men should live loosely and dissolutely, as if baptism and faith were sufficient for a Christian, and there were nothing more required. The true faith is a living faith, and cannot be idle; therefore we teach the people that God hath not called us to luxury and disorder, but, as St Paul saith, 'unto good works, that we might walk in them.' 'That God hath delivered us from the power of darkness, that we might serve the living God.' That we should root up all the relics of sin. That we 'should work out our salvation with fear and trembling;' that it might appear that the spirit of satisfaction was in us, and that Christ himself dwelleth in our hearts by faith.

" 24. To conclude. We believe that this body of ours in which we live, though after death it turns to dust, yet in the last day it shall return to life again, by the Spirit of Christ that dwelleth in us. That then, whatever we suffer for Christ in the interim, he will wipe away all tears from our eyes; and that then, through him, we shall enjoy everlasting life, and be always with him in glory. AMEN."\*

For the first six or seven centuries, the *parochia* was the diocese or episcopal district; and the bishop and his clergy lived together at the cathedral church. The tithes and oblations were all paid to the bishop, who maintained the inferior clergy, repaired and ornamented the church, and maintained hospitality. This collegiate life was common not only in the British church from the first, before the introduction of popery, but also in the Saxon church. The division of dioceses into rural parishes was not the work of one day, or of one particular act. Several causes and persons contributed to the rise of parochial churches. The bishops sent out their clergy to preach to the people as they saw occasion. But after the inhabitants had generally embraced Christianity, this itinerancy was found to be inconvenient. The people required the constant offices of the church, and knew not to whom to resort for spiritual offices and directions; and the distance of the cathedral church prevented their attendance. Sometimes they gave encouragement for clergymen to settle

\* Bishop Jewell's Apology of the Church of England.

among them, who with their assistance erected a church and an adjoining manse. Sometimes kings erected chapels at their country seats, for the convenience of their court and retinue, which were the original of *royal free chapels*. Frequently the bishops, in commiseration of the ignorance of remote country places, erected churches to preserve Christianity among them. But the most frequent, and indeed standing method of erecting churches, depended on the piety of the nobility and landed proprietors. These founded churches on their estates in the country, for the service of their families and tenants. This, therefore, is the primary and only foundation of the patronage of laymen. This made the bounds of a parish commensurate with the extent of a manor or estate. This divided the several portions of the same church, according to the separate interests of the several lords. And this distinct property of lords and tenants, by degrees allotted new parochial bounds by adding new auxiliary churches. In this arrangement the king presented to all the churches which he had built and endowed: the bishop to his, and the lay lords to those which they had erected; and which has continued hereditarily ever since to the heirs and successors of each.

This arrangement of parishes did not however in any way interfere with the spiritual or temporal rights of the bishop. He still had the proper cure of souls within his own diocese, and a title to all the ecclesiastical revenues. It was by his authority that parish churches were erected, and ministers appointed for them, as his helpers and assistants. To prevent any recess from his jurisdiction, or independency of the parish ministers, the most solemn reservations were made to him and his successors. No church, when built, could be employed for public worship, till the bishop had first consecrated it. No priest could officiate or reside there, without the bishop's delegation. There were as many acknowledgments of right and respect paid to the head of the diocese, as the feudal customs demanded for the head of the state. As the tenants did suit and service at the lord's court, which was at his own residence, so the clergy of the diocese were cited to render an account of their stewardship at the cathedral church. For it is the heart of the diocese, the bishop's chair. Each inferior tenant on admission took an oath of fidelity to his prime lord. Every presbyter gained admission to his church with an obligation of obedience to his bishop. The tenant paid rent to his lord for quiet possession. The presbyter made return of some part of the parochial profits to his bishop, for the secure enjoyment of the remainder. No tenant could desert his holding, or substitute another in it, without his lord's acceptance and consent. The parish priest could not forsake his charge, nor appoint another to succeed him in it, without the bishop's express leave and authority. On the death of a feudatory tenant, the custody of the lands

reverted to his lord, till an heir was instated in it. The custody of all vacant benefices likewise reverted to the bishop, who received their mean profits till a successor was appointed and settled. In many other forms and customs of dependency and subjugation, the parochial clergy were accountable to the bishop, in the same manner as the lay tenants were to their feudal lords; so that during all this first institution of parishes, neither tithes, glebes, or oblations, were diverted into lay hands. These were never applied to secular uses, but the bishops and clergy held the absolute property and entire disposal of them, for their own support.\*

In the Liturgy every clergyman who officiates in a church, whether he be the incumbent or his substitute, is called a *curate*. But those in particular who are employed by the incumbent of a church as substitutes, are known by the name of curates. They officiate in his stead, where the incumbent is either old or infirm, or unable to accomplish the whole of the sacred offices of the church. In cases of pluralities, a curate or substitute is absolutely required. The curate is to be licensed and admitted by the bishop of the diocese, who usually appoints his salary. In which case, if he is not paid, he has his remedy in the ecclesiastical court, by a sequestration of part of the profits of the benefice. But if he serves by an agreement with the incumbent without the bishop's license, then he must prove his agreement at common law. Curates who serve a church during its vacancy, shall be paid such stipend as the bishop shall think reasonable out of the profits of the vacancy. If that should not be sufficient, the successor must pay the difference within fourteen days after taking possession.† The bishop may appoint a salary to a curate of £75 per annum, with the use of the parsonage house, or an allowance for it, when the rector or vicar does not personally reside.‡ Churches augmented by queen Anne's bounty, shall be deemed benefices presentive, and the officiating curate may have a like stipend.§ Bishops may license curates employed, though the incumbent has not nominated him. He may also revoke any license, subject however to an appeal to the archbishop.|| By a subsequent act, the bishops are empowered to license curates, and to assign them salaries, in no case less than £80 per annum, and increasing upwards to £150, according to the population of the parish. The curate is also entitled to the parsonage house, when his principal does not reside. He cannot quit his curacy without giving three months' notice to the incumbent and the bishop.¶

One person cannot be curate in two churches at one and the same time: unless it be easily in his power to read both the morning and evening service at both churches. He cannot serve one cure on one Sunday, and

\* Burn's Eccl. Law.  
§ 36 Geo. III., c. 83.

† 28 Henry VIII., c. 11.  
‡ Ibid.

§ 36 Geo. III., c. 83.  
¶ 57 Geo. III., c. 99.

another on the next. He must not neglect to read the morning and evening service at his church every Lord's day. A curate who is engaged by the incumbent, and has not been instituted and inducted by the bishop, may be removed at pleasure by either the incumbent or the bishop. A perpetual curate, who is instituted and inducted by the bishop, cannot be removed. If a bishop ordain any person not provided with some ecclesiastical preferment, he must support him till he prefer him to a living. But fellows, chaplains of colleges, and masters of arts of five years' standing, who live in the university at their own expense, are excepted from this rule.\* The bishops require a *title* before they confer orders. A *title* means the promise of some ecclesiastical preferment, or a certificate from some rector or vicar, promising to employ the candidate, for orders *bona fide* as a curate. At same time he is bound to grant the candidate a certain allowance till he obtain some ecclesiastical preferment, or shall be removed for some fault.

There are four things necessary to be observed, before any one can become a parson or vicar. I. Holy orders. II. Presentation. III. Institution. IV. Induction.

I. HOLY ORDERS. "Orders are not to be accounted for a sacrament of the gospel; as not having the like nature of sacraments with baptism and the Lord's supper; for that they have not any visible sign or ceremony ordained of God."† The church of England declares, "that it is evident unto all men diligently reading the holy Scriptures and ancient authors, that from the apostles' times there have been three orders of ministers in Christ's church, BISHOPS, PRIESTS, and DEACONS. Which offices were evermore held in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried, examined, and known to have such qualities as are requisite for the same; and also by public prayer, with imposition of hands, were approved and admitted thereunto by lawful authority. And therefore to the intent that these orders may be continued and reverently used and esteemed in the united church of England and Ireland, no man shall be accounted or taken to be a lawful bishop, priest, or deacon, in the united church of England and Ireland, or suffered to execute any of the said functions, except he be called, tried, examined, and admitted thereunto, according to the form hereafter following, or hath had formerly episcopal consecration or ordination."‡ Besides this peremptory decision of the church itself, the legislature has also enacted, "that no man can be a lawful priest or deacon, unless he be ordained by a bishop."§ The celebrated Act of Uniformity also declares, "that no person is capable of being admitted to any parsonage or vicarage, benefice, or other ecclesiastical promotion, preferment, or dignity whatsoever, unless such person have episcopal ordination; and if any shall presume to be admitted, not having such ordination, or shall presume to administer the sacrament of the Lord's supper, not being so ordained, he shall forfeit £100."||

The person to be admitted to holy orders, is first examined by the archbishop or bishop, whether he thinks or is persuaded that he is truly called, according to the will of Christ and the due order of the church of England. When the archdeacon presents the candidate, the bishop says: "take heed that the persons whom you present unto us, be apt and meet, for their learning and godly conversation, to exercise their ministry duly to the honour of God and the edifying of his church." To which the person presenting replies: "I have enquired of them, and also examined them, and think them so to be." But before admission to holy orders the candidate must subscribe the three following articles.

\* Canons, 33d of 1603.

† Preface to the Ordination Service.

‡ 35th Article of Religion.

§ 13 Eliz.

|| 14 Charles II.

I. That the king's majesty, under God, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in spiritual and ecclesiastical things or causes as temporal; and that no foreign prince, person, prelate, state, or potentate, hath or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his majesty's said dominions, realms, and countries.

II. That the Book of Common Prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully so be used; and that he himself will use the form in the said book prescribed in public prayer and administration of the sacraments, and none other.

III. That he alloweth the book of Articles of Religion, agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London in the year of our Lord God 1562; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the Ratification, to be agreeable to the word of God.

To these three articles whosoever will subscribe, he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his Christian and surname, viz. "I, N. N. do willingly and *ex animo* subscribe to these three articles above mentioned, and to all things that are contained in them." And if any bishop shall ordain any as is aforesaid, except he first have subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders for the space of twelve months.\*

THE FORM AND MANNER OF MAKING DEACONS.—On the day appointed, after morning prayer is ended, there shall be a sermon, declaring the duties, &c. of deacons. First, the archdeacon or his deputy shall present unto the bishop (sitting in his chair near to the holy table) such as desire to be ordained deacons, (each of them being decently habited,) saying these words:

Reverend Father in God, I present unto you these persons present to be admitted deacons.

*The Bishop.* Take heed that the persons whom ye present unto us, be apt and meet for their learning and godly conversation to exercise their ministry duly, to the honour to God, and the edifying of his church.

*Answer.* I have enquired of them, and also examined them, and think them so to be.

*Bishop.* Brethren,† if there be any of you who knoweth any impediment or notable crime in any of the persons presented to be ordered deacons, for the which he ought not to be admitted to that office, let him come forth in the name of God and shew what the crime or impediment is.

If any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime.

Here the preceding oath is administered.

The bishop then asks the candidate: Will you reverently obey your ordinary (bishop) and other chief ministers of the church, and them to whom the charge or government over you is committed, following with a glad mind and will their godly admonitions.

*Answer.* I will endeavour myself, the Lord being my helper.

The bishop then reads this exhortation:—It appertaineth to the office of a deacon in the church where he shall be appointed to serve, to assist the priest in divine service, and specially when he ministereth the holy communion, and to help in the distribution thereof; and to read the Holy Scriptures and homilies in the church, and to instruct the youth in the catechism; in the absence of the priest to baptize infants, and to preach if he be admitted thereto by the bishop. And furthermore, it is his office, when provision is so made, to search for the sick, poor, and impotent people of the parish; to intimate their estates, names, and places where they dwell unto the curate, that by his exhortation they may be relieved with the alms of the parishioners or others.

Then the bishop laying his hands severally upon the head of every one of them, humbly kneeling before him, shall say:

*Bishop.* Take thou authority to execute the office of a deacon in the church of God com-

\* Gibson, tit. vi. cap. 7.

† This is addressed to the congregation then present.

mitted unto thee. In the name of the Father, and of the Son, and of the Holy Ghost. Amen.

Then shall the bishop deliver to every one of them the New Testament, saying :

Take thou authority to read the gospel in the church of God, and to preach the same, if thou be thereto licensed by the bishop himself.

And here it must be declared unto the deacon, that he must continue in the office of a deacon a whole year (except for reasonable causes it shall otherwise seem good unto the bishop) to the intent he may be perfect, and well expert in the things appertaining to the ecclesiastical administration. In executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood, at the time appointed by the canon ; or else on urgent occasion, upon some other Sunday or holiday in the face of the church.

The canons of 1603, drawn up in the reign of James I., prohibit any one from being made a deacon and a priest on the same day.

In the form for ordaining priests, the next higher degree, the questions and answers are the same as are put to deacons. After prayer, and *Veni Creator*, or "Come, Holy Ghost, our souls inspire," the bishop repeats a prayer of thanksgiving for the benefits conferred by the Christian ministry : after which

The bishop with the priests present shall lay their hands severally upon the head of every one that receiveth the order of priesthood, the receivers humbly kneeling on their knees, and the bishop saying :

Receive the Holy Ghost for the office and work of a priest in the church of God now committed unto thee by the imposition of our hands. Whose sins thou dost forgive, they are forgiven ; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of God and of his holy sacraments. In the name of the Father, and of the Son, and of the Holy Ghost. Amen.

Then the bishop shall deliver to every one of them kneeling, the Bible, into his hand, saying :

Take thou authority to preach the word of God, and to minister the holy sacraments in the congregation\* when thou shalt be lawfully called thereto.†

At every ordination the Lord's supper is always administered to the candidates, and to such of the laity as choose to communicate.

The statute of provisor‡ regulated that archbishops and bishops should be elected by the deans and chapters of their sees.

Our lord the king hath ordered and established, that the free elections of archbishops, bishops, and all other dignities and benefices elective in England, shall hold from henceforth in the same manner as they were granted by the king's progenitors, and the ancestors of other lords, founders of the said dignities and benefices.

The bishoprics of England were all of the king's foundation ; he is therefore in right thereof the patron of them all. They were originally donative, and were bestowed *per traditionem annuli et baculi*, till the reign of king John, when they became elective. The ancient laws and canons of the church admit of no consecration of a bishop by a less number than three bishops. After election and confirmation, but not before, the bishop is invested with a right to exercise all *spiritual jurisdiction*. The dignities of which a bishop was possessed before his election, do not become void till after his consecration, or when translated from one see to another, after confirmation. Every bishop, either on his creation or his translation, is bound immediately after confirmation, to make a legal conveyance to the archbishop, of the next avoidance of any dignity or benefice belonging to his see as the archbishop shall choose. This is therefore called an *option*.§

Every man who is to be ordained or consecrated a bishop, shall be full thirty years of age. The consecration of a bishop must always be performed on some Sunday or holiday.¶

FORM OF CONSECRATION OF A BISHOP.—After the gospel, the Nicene creed, and the

\* Congregation here means the church.

† Ordination Service.

‡ 25 Edward III., § 3.

§ Gibson's Codex Juris Ecclesiastici Anglicani.

¶ Preface to Ordination Service.

sermon are ended, the elected bishop (vested with his rochet) shall be presented by two bishops unto the archbishop of that province, (or to some other bishop appointed by lawful commission,) the archbishop sitting in his chair near the holy table (or altar,) and the bishops that present him, saying :\*

Most reverend father in God, we present unto you this godly and well learned man, to be ordained and consecrated bishop.

Then shall the archbishop demand the king's mandate for the consecration, and cause it to be read, and the oath touching the acknowledgment of the king's supremacy shall be ministered to the person elected, as it is set down before in the form for the ordering of deacons. And then shall also be ministered unto them the oath of due obedience to the archbishop, as followeth :

In the name of God. Amen. I, N., chosen bishop of the church and see of N., do profess and promise all due reverence and obedience to the archbishop, and to the metropolitan church of N. and to their successors. So help me God through Jesus Christ.

An archbishop does not take this oath. At the Reformation this oath was substituted in place of that taken to the pope, which bound them to the most implicit obedience to the see of Rome. When Cranmer was consecrated to the see of Canterbury, he entered a solemn protest, in which he disclaimed all such clauses in the oath to the pope as might interfere with his duty to God and the king; all such, likewise, as might be interpreted as restraints upon him from *endeavouring a reformation* in the church of England.†

The archbishop then asks, Are you persuaded, that you are truly called according to the will of our Lord Jesus Christ, and the order of this realm ?

*Answer.* I am so persuaded.

*Archbishop.* Are you persuaded that the Holy Scriptures contain sufficiently all doctrine required of necessity for eternal salvation through faith in Jesus Christ? And are you determined out of the same Holy Scriptures to instruct the people committed to your charge : and to teach or maintain nothing as required of necessity to eternal salvation, but that which you shall be persuaded may be concluded and proved from the same ?

*Answer.* I am persuaded and determined by God's grace.

*Archbishop.* Will you then faithfully exercise yourself in the same Holy Scriptures, and call upon God by prayer for the true understanding of the same ; so as you may be able by them to teach and exhort with wholesome doctrine, and to withstand and convince the gainsayers ?

*Answer.* I will do so, by the help of God.

*Archbishop.* Are you ready with all faithful diligence to banish and drive away all erroneous and strange doctrine contrary to God's word ; and both privately and openly to call upon, and encourage others to the same ?

*Answer.* I am ready, the Lord being my helper.

*Archbishop.* Will you deny all ungodliness and worldly lusts, and live soberly, righteously, and godly, in this present world ; that you may show yourself in all things an example of good works unto others, that the adversary may be ashamed, having nothing to say against you ?

*Answer.* I will do so, the Lord being my helper.

*Archbishop.* Will you maintain and set forward, as much as shall lie in you, quietness, love, and peace, among all men ; and such as be unquiet, disobedient, and criminous within your diocese, correct and punish ; according to such authority as you have by God's word, and as to you shall be committed by the ordinance of this realm ?

*Answer.* I will do so, by the help of God.

*Archbishop.* Will you be faithful in ordaining, sending, or laying hands upon others ?

*Answer.* I will so be, by the help of God.

*Archbishop.* Will you show yourself gentle, and be merciful for Christ's sake to poor and needy people, and to all strangers destitute of help ?

*Answer.* I will so show myself, by God's help.

\* Rubric.

† Gibson's Codex.

‡ Titus i. 13 ; ii. 15



Then shall the bishop elect put on the rest of the episcopal habit.

Then the archbishop and bishops present shall lay their hands upon the head of the elected bishop, kneeling before them upon his knees; the archbishop saying,

Receive the Holy Ghost for the office and work of a bishop in the church of God, now committed unto thee by the imposition of our hands. In the name of the Father, and the Son, and the Holy Ghost. Amen. And remember that thou stir up the grace of God which is given thee by the imposition of our hands. For God has not given us the spirit of fear, but of power, and love, and sobriety.

After which is sung the *Veni Creator*, or "Come, Holy Ghost, Creator, come;" and the prayer that God may grant him grace to preach the gospel willingly, and to use his authority wisely, is repeated.

Then the archbishop shall deliver him the Bible, saying: Give heed unto reading, exhortation, and doctrine. Think upon the things contained in this book. Be diligent in them, that the increase coming thereby may be manifest unto all men. Take heed unto thyself and unto doctrine, and be diligent in doing them; for by so doing, thou shalt both save thyself, and them that hear thee. Be to the flock of Christ a shepherd, not a wolf; feed them, devour them not. Hold up the weak, heal the sick, bind up the broken, bring again the outcasts, seek the lost. Be so merciful, that you be not too remiss; so minister discipline, that you forget not mercy: that when the Chief Shepherd shall appear, you may receive the never-fading crown of glory, through Jesus Christ our Lord. Amen.\*

Then the archbishop shall proceed in the communion service; with whom, the new-consecrated bishop, with others, shall also communicate.

II. The next requisite we mentioned was presentation. The king is patron paramount of all the benefices in England. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons, belongs to the crown. On the same principle the king presents to all dignities and benefices in the gift of the bishops during the vacancy of the sees.† No person can accept a bishopric in Ireland until he has resigned all the preferments which he held in England: An alien who is in priest's orders may be presented to a living in England. A layman or a deacon may be presented, but before he is inducted he must be ordained a priest. No patron can present himself. He offers himself to the bishop, and prays to be admitted; or he may make over the right to present to some other temporality. Presentation may be made either in word or writing. If by word, the patron must declare it in the presence of the bishop. If by writing, it is not a deed, but a letter missive, in form following:

To the right reverend Father in God, R. lord bishop of \_\_\_\_\_ (or in his absence to his vicar-general in spirituals, or to any other having, or who shall have, sufficient authority in his behalf,) I, Sir W. P., baronet, true and undoubted patron of the rectory of the parish church of \_\_\_\_\_ (or of the vicarage of \_\_\_\_\_) in the county of \_\_\_\_\_ and in your diocese of \_\_\_\_\_ now vacant by the death (or resignation, removal, or otherwise) of A. B., the last incumbent there, do present unto you C. D., clerk, master of arts, humbly requesting that you will be pleased to admit the said C. D., to the said church, and to institute and cause him to be inducted into the same, with all its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your episcopal office. In witness whereof, I have hereunto set my hand and seal, the day of \_\_\_\_\_ in the year \_\_\_\_\_

As before mentioned, in the original settlement of the church of England, the bishops had their clergy under their own immediate care. And that on the lords of manors building and endowing churches, the bishops suffered the patrons to nominate persons for them, provided the bishops were satisfied of their fitness. The right of patronage, therefore, is really but a limited trust, and the bishops are still in law the judges of the fitness of the clergy to be employed in the several parts of their dioceses. The patrons never had the absolute disposal of benefices upon their own terms. If they did not present *fit* persons within the limited

\* Ordination Service.

† Gibson's Codex.

‡ Ibid.

time, then the bishop was bound to provide for them. The examination of the abilities and sufficiency of the persons presented, belongs to the bishop. He is the ecclesiastical judge, and may and ought to refuse the person presented if he be not fit. The 39th canon directs, that "no bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour; and shall appear upon due examination to be worthy of his ministry."

III. We proceed now to the next requisite, which is Institution. Its form is, that the minister kneels down before the bishop, whilst he reads the words of institution out of a written instrument with the seal episcopal appendant. During the ceremony, the clerk or minister holds the seal in his hand. The oaths against simony, of allegiance, of canonical obedience, of residence, are then administered to the minister. He must also subscribe the three articles already given, page 681. Every dean, canon, and prebendary of any cathedral, or collegiate church, and every parson, vicar, curate, lecturer, and every other person in holy orders, who shall be incumbent, or have possession of any deanery, living, &c., shall in the presence of the bishop, at or before his admission to be incumbent, or have possession aforesaid, subscribe the declaration or acknowledgment following: "I, A. B., do declare that I will conform to the liturgy of the church of England, as it is now by law established."\* The bishop then executes and delivers to the party instituted, a written mandate to the archdeacon, or other proper person, to induct him. By institution the cure of souls is committed to the minister. Presentation gives him a right *ad rem*, and institution or collation gives him a right *in re*. In consequence, he may enter into the glebe, and take the tithes; but till he is inducted he can neither grant nor sue for them.†

IV. Induction is the last requisite. Induction vests the incumbent with full possession of the whole profits belonging to the church. Accordingly the inductor usually takes the clerk (minister) by the hand, and lays it upon the key, or upon the ring of the church door. If the key cannot be had, and there is no ring on the door, or if the church be ruinous, then on any part of the wall of the church or churchyard, and says, "By virtue of this mandate, I do induct you into the real, actual, and corporal possession of this church of C, with all the rights, profits, and appurtenances thereto belonging." After which the inductor opens the door, and puts the person inducted into the church. The bell is then tolled, to make his induction public, and known to the parishioners. The clergyman who inducts then indorses a certificate of the induction on the archdeacon's mandate, and those present sign as witnesses. Induction gives corporal possession. By it the minister is seized of the temporalities of the church. He has power to grant them, or to sue for them. He is unexceptionably entitled to plead that he is parson *impersonae*. By induction the church is full, not only against a common person, but also against the king. The church is completely full, and the minister is complete incumbent or possessor. This is compared to livery and seisin in common law, by which possession is given to temporal estates.‡

By the Act of Uniformity, any person inducted to any ecclesiastical benefice, is obliged within two months after induction, openly, publicly, and solemnly, to read the morning and evening prayers in the church or chapel to which he has been inducted. After which, he shall openly and publicly, before the congregation, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words and no other: "I, A. B., do here declare my unfeigned assent and consent to all and everything contained and prescribed in and by the book intituled, The Book of Common Prayer, and administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the church of England; together with the Psalter or Psalms of David, pointed as they are to be sung or said in churches; and the form or manner of making, ordaining, or consecrating of bishops, priests, and deacons." The penalty of neglect, or refusal to comply, is deprivation *ipso facto*. He must also publicly read the Thirty-nine Articles of Religion, otherwise he "shall be upon every such default *ipso facto* deprived." He must also within three months, publicly and openly, upon some Lord's day, read the bishop's certificate of his

\* Act of Uniformity.

† Gibson's Codex.

‡ Ibid.

having subscribed the declaration of conformity to the Liturgy of the church of England, as it is now by law established. Finally, within six months after his admission, he must take the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general quarter sessions of the peace. This must be done under pain of incapacitation to hold the benefice, of being disabled to sue in any action, to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and of forfeiting £500.\*

The CONVOCATION of the church of England, is much the same as the general assembly of the church of Scotland; with this difference, that as in England and Ireland, there are two houses of parliament, so there are two houses of convocation; whereas in Scotland, there having been only one house of parliament, there is accordingly but one house or chamber of the general assembly. In Saxon times, all bishops and abbots sat and voted as such in the state councils or parliaments, and not on account of their tenures. After the conquest, the abbots sat in parliament, not as abbots, but in virtue of their tenures as barons. But the bishops sat there in a double capacity, *first*, as bishops, as they had formerly done in Saxon times, and *secondly*, as barons. That they sat there not only in virtue of their baronies, but also as bishops, appears evident from this fact, that during the vacancy of any bishopric, the *custos spiritualium*, or guardian of the spiritualities of the vacant bishoprics, was summoned to sit in parliament in place of the bishop. And when any bishop was absent from the kingdom, his vicar-general was summoned to represent him in parliament. These remarks are alike applicable to the general assembly of Scotland *before* the Reformation.

The body spiritual is a distinct estate by itself, and is the first estate of parliament. It is more distinct from the other two estates of parliament, than they are from each other. The other two are both comprehended under one denomination of temporality, and compose its several parts, whereas the spirituality is of an entirely different nature, and is incommunicable with the other two. Formerly this was more apparent, because the spiritual body was not taxable by the king and parliament, but was taxed by themselves in convocation. The possessions of the church being reckoned God's patrimony, as being dedicated to Him and His church; and therefore no temporal power could dispose of it, under peril of sacrilege. This mode of taxing the clergy of England was always observed till the grand rebellion and destruction of the constitution under Cromwell. After the Restoration, and before the old established usages could be resumed, the mode of taxation during the usurpation was continued, till the government could be restored to its former course. Accordingly, in the first act of parliament after the Restoration, which imposed taxes on

\* 1 Geo. II., c. 13. 9 Geo. II., c. 26. Burn's Eccl. Law.

the clergy in common with the laity, there is an express proviso, saving to the clergy their ancient right of taxing themselves in convocation. From this precedent, however, the custom has ever since prevailed, and the clergy are now taxed in the same manner as the laity.

The persons of the clergy have always been esteemed so sacred, that if any were guilty of a capital crime, or deserved a personal disgrace or punishment, care was taken by his spiritual superiors to preserve the official character from sharing in the disgrace, by having the person previously degraded, and so delivered up *as a layman* to the *brachium seculare*, or secular arm, to be tried as a layman for his offences. The church of England claims no sanctuary for her guilty children as the church of Rome does. Though the exemption of clergymen from the secular power, even in secular causes, was an unreasonable and unjust usurpation of the church of Rome; yet with regard to religion in general, Christianity requires that its ministers should be so far exempted from public contempt, that when they suffer for personal crimes, their punishment should only be *personal*, but that their *profession* should not suffer with them. However, while the law stood as just stated, no clergyman could be tried by laymen, till *after* he was degraded by his spiritual superiors, and reduced to the character of a layman.

For some of the first reigns after the conquest, and during the reigns of most of the Anglo-Saxon kings, parliaments and synods, or convocations of the church, were so much alike, that some of those which have been called parliaments, might as well have been called synods or ecclesiastical convocations. Those especially which were called by the authority of the pope or the archbishop of Canterbury. Before the conquest, though the king himself with all his nobility were present in the ecclesiastical councils, and the ecclesiastical laws of England were for the most part enacted in the king's name, yet the archbishop of Canterbury had the power of himself, without any particular license from the king or the pope. He repeatedly assumed the power of calling councils of the clergy and nobility, and of making canons. But the conqueror deprived the archbishop of the power of making canons, or enacting or decreeing any thing, without the king's special license and approbation.\*

The convocation is divided into the upper and the lower house, the members of which sit in different chambers, and conduct their debates much in the same manner as the two houses of parliament. The lower house, which consists of the inferior clergy, choose one of their own number to be their prolocutor, who communicates the result of their debates to the upper house, which consists entirely of the bishops. The whole number

\* Hody's History of English Councils and Convocations.

of the convocation of the province of Canterbury at this time, is one hundred and sixty-six; *viz.* twenty-two in the upper house, and one hundred and forty-four in the lower. Before the dissolution of the monasteries the number was much greater, and the upper house contained more members than the lower.

A convocation may be considered in a double sense. Either in itself, as it is a synod, and called by the archbishop's mandate, or, as it is in the strictest sense, a part of the parliament, and summoned by the king's writ directed to each particular bishop. In this latter case it is a convocation not merely of the province of Canterbury but also of the province of York; and they are all commanded to meet together at the same time and place as the parliament; but as it is summoned by the archbishop, it is only a provincial convocation. The king sends his writ to the archbishops of the two provinces of Canterbury and York, commanding them to summon all the bishops of their provinces to meet in convocation, at a certain time and place, and to command the bishops to summon all their deans, archdeacons, chapters, and clergy, to meet at a certain time. For several ages, the great council, *Witena Gemot*, or parliament of England, are scarcely distinguishable from synods or convocations.\*

It is unquestionable that the bishop of every diocese had the power in every Christian country to convene the clergy of his diocese, and in a common synod or council to transact with them such affairs as related to the government and discipline of the churches under his care. These synods were as old as the first settlement of Christianity; and amidst all the changes and revolutions of the state continued to be held till the reign of Henry VIII. What every bishop did in his diocese, the archbishop did in his province. He first called together the bishops, and afterwards as many of the parochial clergy as he thought needful. In these diocesan and provincial synods nothing but the spiritual affairs of the church were transacted. In these particulars there was no difference between the customs of the English church and those of all other Christian countries.

After the papal authority was firmly fixed, legates from Rome, sometimes with and sometimes against the royal license, summoned larger councils, consisting of the bishops and prelates of the whole realm. These were properly national councils held for some special design, which either the king, the pope, or both, had to promote by them. The first national council held in England was that of Hereford, (Hertford), in 673; and the last was held by cardinal Pole in 1555. Although national councils are not now called together, yet on emergencies the provincial synods of Canterbury and York act by mutual correspondence and joint consent.

\* Hody's History of English Councils and Convocations.

Besides these national councils, there were two other assemblies of the clergy. In these the clergy were convened not only for the spiritual affairs of the church, but for the good and benefit of the realm, and to act as members of the state as well as of the church. The reason of this is obvious. When the Christian faith was thoroughly planted in England, and the piety of the nobility and gentry had liberally endowed the bishops and clergy with temporal lands and possessions, not only the general opinion of their prudence and piety drew the most eminent of the clergy into the public councils, but the interest which the clergy themselves had in the state, made it expedient to do so, and to commit the direction and management of affairs to them. Hence the bishops first, and afterwards the other prelates (abbots and priors) were very early brought into the great council of the nation or parliament, and thus became a constant and established part of them. In time, however, the king began to think it reasonable that the clergy should bear a part of the public burdens. Accordingly the Saxon monarchs, under whom the church was most free, subjected their lands to the threefold burden of castles, bridges, and expeditions. The granting of aids in these cases, brought on assemblies of the clergy, which were afterwards distinguished by the name of CONVOICATIONS.\*

In the Saxon times the lords spiritual held by frankalmoigne, but William the Conqueror turned their tenures into baronies, which obliged them to furnish soldiers, or pay escuage instead. Their attendance in parliament then became compulsory; of which they complained, and which was the cause of the grand quarrel between Thomas à Becket and Henry II. The clergy had been exempted from most of the charges assessed on the laity. In order to bring them under the same obligation, after many disputes it was at last agreed that the pope should tax the clergy for the use of the king. The bishops were also prevailed upon on extraordinary occasions, to compel their clergy to grant a subsidy to the king, under the name of a benevolence. These concessions were sometimes made by the bishops in the name of their clergy. But the most common way was for every bishop to hold a meeting of the clergy of his diocese, and agree with them what to do. First they empowered their bishops, afterwards their archdeacons, and finally proctors chosen by themselves for that purpose, to make the concession for them.† Edward I. determined to stand on a less precarious footing with the spiritual estate, and he altered the convocation to nearly its present establishment. He not only called the bishops, whom as barons he had a right to summon, but the rest of the clergy, that he might obtain their consent to the taxes and

\* Wake's State of the Church.

† Ibid.

assessments made on them. But the clergy, foreseeing they would be taxed, pretended that they could not meet under a temporal authority to make any laws or canons for the government of the church. The bishops entered keenly into this dispute, not only because they objected to the taxation of the clergy, but to their having any interest in the making of ecclesiastical canons, which were formerly made by the bishops alone. The archbishops and bishops threatened to excommunicate the king. But the king and the temporal estate, displeased at their objecting to bear the public burdens, outlawed the clergy, and seized their possessions into the king's hand. This humbled the clergy, and they consented to meet. To take away all pretence of a temporal authority, the archbishops were commanded to summon the bishops, deans, archdeacons, colleges, and the whole clergy of their provinces. Hence they met by the archbishop's authority. The bishops and clergy came to convocation by virtue of the archbishop's summons, esteeming it to be in his power whether he would obey the king's writ or not, of which they were exceedingly jealous. From henceforth the clergy composed two synods under the summons of their respective archbishops, where they sat and made canons by which each province was bound, and gave aids and taxes to the king. The clergy of Canterbury and York assembled, each in their own province, and were formed in the nature of a parliament. The archbishop sat as king. The bishops sat in the upper house as his peers; the deans, archdeacons, and the proctor for the chapter, represented the burgesses; and the two proctors for the clergy, the knights of the shire. And so this body became an ecclesiastical parliament, to make laws, and to tax the possessions of the church.\* The clergy were drawn to parliament against their own inclinations. But although they thus sat as a parliament, and made laws for the church, yet they did not make a part of the parliament properly so called. Even the convocation-tax on themselves, did not bind as a law till it had passed both houses of parliament.†

The convocation stood in this manner up to the 25th of Henry VIII., when the act of submission was passed, which enacts that the clergy, "submitting themselves to the king's majesty, have promised, *in verbo sacerdotii*, that they will never from henceforth presume to attempt, allege, claim, or put in ure, enact, promulge, or execute any new canons, constitutions, ordinances, provincial or other, in the convocation, unless the king's most royal assent and license may to them be had," &c. After this it was determined, 1. That a convocation cannot assemble without the king's assent. 2. That after assembling, they cannot constitute canons without the king's license. 3. Neither after canons are duly enacted, can they be

\* Burn's Eccl. Law.

† Kennet's Eccl. Syn.

executed without the royal assent. 4. After the royal assent, they cannot execute any, but within these four limitations :—that they be not against the king's prerogative ; nor against the common law ; nor against any statute law ; nor against any custom of the realm.

Whenever a new parliament is called, writs are issued by the crown to the two archbishops to call a provincial synod ; the first to meet at London, the other at York. As before mentioned, the clergy taxed themselves, up to the time of the long parliament. After the Restoration, archbishop Sheldon made a private agreement with lord chancellor Clarendon, that the clergy should silently waive the privilege of taxing their own body. This has made convocations unnecessary to the crown, and inconsiderable in themselves. In lieu of this, the clergy were granted the privilege of voting at county elections as freeholders. From that time, 1664, neither synod has passed any synodical act. They were regularly summoned, but rarely met, and never in full solemnity. In the reign of king James II., the writs issued out, of course, but the members did not meet. In 1689, a convocation was not only called, but began to sit in due form ; but archbishop Sancroft refused to transfer his allegiance, and therefore was incapacitated from sitting. Since 1700, the convocation of the clergy has been solemnly opened at the meeting of every parliament, and the clergy of the lower house have been permitted to constitute themselves, and to choose a prolocutor. And now it seems to be granted on all hands, that they are of right to be assembled concurrently with parliaments, and may act and proceed as provincial councils, when his majesty in his royal wisdom shall deem it expedient.\*

There is a difference in the customs of parliament and of the convocation. It is but one session of the former, if they meet daily for three or more months ; but every day's meeting and sitting is, in the language of the convocation, a distinct session. A prorogation of parliament breaks off all business, so that every thing must begin *de novo* next session. But by a *continuation* of the convocation, all business remains in the same state, and may be resumed where they left off the preceding session. Parliament is *prorogued*, but convocation is *continued*.

Writs are issued to all the bishops to come to parliament ; *præmunientes*, that is, " warning him to bring with him the deans and archdeacons within his diocese, one proctor for each chapter, and two for the clergy of his diocese." An English synod or convocation as it now stands for the province of Canterbury, consists of the archbishop, who is the president (or moderator), twenty-one bishops, twenty-two deans, fifty-three archdeacons, forty-four proctors or representatives for the diocesan clergy,

\* Johnson's Vademecum, 152.



and twenty-four proctors of the chapters. The members of the convocation enjoy the same privilege of freedom from arrest as the members of the house of commons. It is enacted, "that the clergy called to convocation by the king's writ, together with their servants and families, shall fully use and enjoy such liberty, or defence, in coming, tarrying, and returning, as the great men, or commonalty of the realm do, or ought to enjoy."\* This act has always been so understood, that proctors chosen by the provincial writ have been as safe from arrest, as if they had been chosen by virtue of the *præmunientes*.†

Reference is frequently made to our Lord's words: *My kingdom is not of this world*. From the context, however, it cannot be made to say anything either for or against an establishment. Pilate was made to believe that Christ claimed the rank and title of a temporal prince, and as such was an enemy to Cesar. To ascertain the truth of this accusation Pilate demanded of our Lord, *Art thou the king of the Jews?* Our blessed Lord admitted the fact: *Thou sayest that I am a king*. But to undeceive the Roman governor as to the nature of his kingship, he added: *My kingdom is not of this world: if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews: but now my kingdom is not from hence*: that is, mine is a spiritual kingdom, altogether different from Cesar's. His kingdom is of this world, mine is not of this world, and therefore my sovereignty cannot interfere with his rights. As a proof of which, I have not commanded my servants to fight for me, which, had my kingdom been a temporal one, I should certainly have done. Here, however, was an opportunity for condemning an establishment, had it been improper. Among the Jews, the church and state were very closely united. The Jewish church was as much established in Palestine, and that by God's own authority, as the Christian church is in Great Britain. There is no established church in America. In the cities and towns of that country, where religion is regarded as a luxury, churches and chapels abound. But in the rural districts, the population is either utterly destitute of pastoral supervision, or depends for the sacraments and for spiritual education on the visits, few and far between, of some chance missionary. Where there is no national establishment, those who require instruction must have none at all. And therefore, whether we look at the fact with the eye of a legislator or of a Christian, the circumstance of stationing a man of education, respectability, and religion, in each parish, where the inhabitants are too poor to support, or too ignorant to desire, an instructor, is an advantage to the country, which will only then be properly appre-

\* 8 Henry VI., c. 1.

† Johnson's *Vademecum*, 159.

ciated when it is lost. Again, the position of the higher ecclesiastics, as the compeers of the royal and the great, gives to English society that moral tone which is the glory of the country. By intercourse with the good, the irreligious learn to respect virtue, and their children are brought up in the nurture and admonition of the Lord. Religion is thrust as it were into every man's face, inquiry is courted, and inquiry leads to sobriety and conviction.\*

We conclude this subject in the words of a learned and pious writer : " That every church hath power to decree rites and ceremonies, will not now, and could not at any time be questioned, by any sound and sober Christian, so that there be nothing decreed contrary to Scripture, and so that *all things be done decently and in order*. This power the church of England asserts and claims in her twentieth article. That she has exercised it in conformity with Scripture, and made all her arrangements in conformity with St Paul's injunctions, she not only believes, but has proved as often as the truth has been questioned. The liturgy we can examine. We can learn its import, and prepare ourselves for its use—prepare ourselves so as to add the *spirit* of prayer to the *form* which we know. The united church of England and Ireland claims to be a part of the catholic church, or spouse of Christ, the mould in which the heirs of immortality are begotten, nurtured, and prepared for their heavenly inheritance. It is a remarkable fact, well worthy of the most serious reflection, that the church of England, reformed by the most sober-minded, learned, and judicious divines of that most remarkable age, stands now as she stood then, the same in doctrine and discipline—the acknowledged bulwark of pure, true, and undefiled religion, against popery, fanaticism, and all the various degrees of infidelity;—which unity of faith and discipline cannot be predicated of any other church of the reformation which we know ; while of most of them, the direct contrary must with equal grief and indignation be acknowledged."†

The church of England, and indeed the whole of the Western church, was crucified, like her divine head, between the usurpation of the popes and the king. The contest between these rival powers, raged fiercely from the grand usurpation of pope Hildebrand up to the reign of Henry VIII. For several hundred years the Anglo-Saxon church and state made their respective laws in perfect concord; and there cannot be shown one single Saxon law that is in contradiction to the canons of the church. It was William the Conqueror who first invaded the rights and liberties of the English people, and that first broke in upon the freedom of the English church. He would not suffer the primate in a convocation to enact

\* Hook on Establishments.

† Bishop Walker's Life of Archbishop Whitgift.

any canon, of which he himself did not first approve, neither would he suffer any bishop to censure, or inflict any ecclesiastical penances upon any of his ministers or courtiers. And what is very remarkable, although he pretended to be a true and zealous son of the church of Rome, yet he would allow none in his dominions to acknowledge any pope without his consent. "Thus," says Eadmer, "all divine as well as human affairs were governed by his beck." Rome's encroachments, however, were not all accomplished in one day. The pope's supremacy in England fluctuated according to the weakness, the necessities, or the superstitious devotion, of her sovereigns. Henry I. yielded to the pope the patronage and donation of his bishoprics and all other ecclesiastical benefices. Stephen granted that the clergy might appeal to Rome, which in effect yielded the whole dispute. Henry II. conceded to the clergy the right of exemption from the secular power, so that a clergyman, as such, could not be tried by a lay judge, but only by his spiritual peers. The turbulence of Thomas à Becket occasioned the famous constitutions of Clarendon to be drawn up, which considerably curbed the pope's supremacy. A dispute between king John and Innocent III. about the investiture of the archbishop of Canterbury, so incensed that haughty pontiff that he laid the whole kingdom under an interdict for six years. During all that time, the ordinances and the sacraments of the church were suspended, and the whole kingdom was without any religion whatever. This claim, and most tyrannical exercise of an ecclesiastical jurisdiction by a foreign potentate, was productive of such ruinous effects, that the king and the temporal estates were roused, and even the spiritual estate took part with their sovereign, and joined vigorously in resisting this foreign usurpation. Accordingly severe laws were enacted by Edward I., II., and III., Richard II. and Henry IV. Yet notwithstanding these efforts at resisting the papal supremacy, partly by sufferance, partly by negligence, the whole nation being popish, and held under a devotional slavery, there was not any successful opposition exerted till the reign of Henry VIII. In his reign the parliament complained of appeals to Rome, "in cases of matrimony, divorces, tithes, &c. to the great inquietation, vexation, and trouble, costs, and charges, of the king's highness and many of his subjects," &c. And in the next session, they further complain, "that the subjects of this realm have been greatly decayed and impoverished, by intolerable exactions of great sums of money, claimed and taken out of this realm by the bishops of Rome, as well in pensions, census, Peter-pence, procurations, provisions, delegacies, rescripts in causes of contention, and appeals, as also for dispensations, licenses, faculties, &c., who assumed a power to dispense with all human laws, uses, and customs of all realms."

A short time before Henry's breach with Rome, and before there was

any word of a Reformation, but while the whole kingdom was in full communion with the pope, the convocation, 22 Henry VIII., fully acknowledged and recognized him "to be supreme head on earth of the church within his own dominions." This monstrous title naturally roused the king's ambition and avarice, and in consequence, one fine morning, in the 26th year of his reign, the old Defender of the Faith appointed Cromwell his vicegerent in all ecclesiastical affairs. But the church so detested this novel and monstrous office, that it was never revived; it was beheaded with its first possessor. Henry fortified his headship, which he founded on the declaration of the *popish* convocation, with an act of parliament, to the astonishment of all Christendom;—"Albeit the king's majesty justly and rightly is, and ought to be, the supreme head of the church of England, and is so recognized by the clergy of this realm in their convocations; yet nevertheless, for corroboration and confirmation thereof, and for increase of virtue in Christ's religion, within this realm of England, and to repress and extirpate all errors, heresies, and other enormities and abuses heretofore used in the same, it is enacted by authority of this present parliament, that the king our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed, *the only supreme head on earth of the church of England*, called *Anglicana Ecclesia*, and shall have and enjoy, annexed to the imperial crown of this realm, as well the title and style thereof, as all honours, dignities, and pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the same dignity of the *supreme head of the church*, belonging and appertaining; and that our said sovereign lord, his heirs and successors, kings of this realm, shall have full power and authority, from time to time, to visit, repress, redress, reform, order, correct, restrain, and amend, all such errors, heresies, abuses, offences, contempts, and enormities, whatsoever they be, which by any manner of spiritual authority, or jurisdiction, ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity, and tranquillity, of this realm, any usage, custom, *foreign laws*, *foreign authority*, prescription, or any thing or things to the contrary thereof notwithstanding."\* In consequence of this act, both houses petitioned the king to tender an oath for the exclusion of the long usurped power of the pope, the preamble of which was, "I, A. B., having now the veil of darkness of the usurped power of the see of Rome, clearly taken away from mine eyes, do utterly testify," &c.

The church of England concurs with that of Scotland, in maintaining

\* 26 Hen. VIII., cap 1.

that "there is no other *head* of the church but the Lord Jesus Christ."\* For the first three hundred years after Christ, there was no *regal*, and for six hundred years there was no *pontifical* headship, in the sense at least in which it is now understood. During all that time the church was distinct from, and independent of both the crown and the pope. The supremacy of the crown is entirely of a temporal nature, and is confined to the civil government of both clergy and laity. This state of subjection to the civil power—"the powers that be"—existed from the first. The apostle commands "*every* soul to be subject to the king as *supreme*." Our Saviour himself, the divine and only Head of the church, set us an example of submission to the imperial supremacy. He *suffered* under Pontius Pilate. He acknowledged the *civil* authority of that unjust judge, but at the same time reminded him that he received his power from God. There is not one word in Scripture which exempts the clergy from the sword of the prince, even in heathen times, far less now when he is a member of the church. There is not a word in Scripture which either confers or permits a spiritual supremacy, either in the pope or any other ecclesiastical person. By degrees the pope usurped a jurisdiction superior not only to his own canon law, but also to the municipal law of all kingdoms. In England this was exerted so tyrannously, trampling on the just rights of the prince, the people, and the church, that it could be borne no longer. Henry VIII. had the courage to shake it off, and suppressed the pope's power in England for ever. To un rivet those usurpations on the ecclesiastical and even on the civil state, under the vague pretence, *in ordine ad spiritualia*, the oath of the king's supremacy was framed. It was the severest blow which the religion of Rome ever received. It laid the axe to the root of popery, for *the supremacy is the real pivot* on which popery hinges. As it has been since modified, the oath is as follows: "I, A. B. do swear that I do from my heart abhor, detest, and abjure as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare that no foreign prince, person, prelate, state, or potentate hath, or ought to have any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual within this realm. So help me God."

The consequence to the church, of Henry's breach with Rome was merely a change of masters. He threw off nothing of popery but the foundation of its whole power—the supremacy. He did not restore the church to her freedom; he assumed the same supremacy which the pope

\* Westminster Confession of Faith, ch. xxx.

had exercised. In all other respects he lived and died a zealous papist. The public worship continued as formerly in an unknown tongue. Image worship, invocation of saints and the Virgin Mary, and prayers for the dead, were still retained. The doctrines of purgatory, transubstantiation, and works of supererogation, were still maintained, and the seven sacraments were solemnized as heretofore. Whoever opposed, wrote, or spoke against his supremacy or these doctrines, *suffered death as heretics*. This statute was executed with unrelenting severity, and many both of the clergy and laity were burnt at the stake. Nothing was more common than to see a staunch Romanist, for denying the king's supremacy, and a zealous protestant, for non-compliance with the ceremonies, chained together, back to back, and burnt alive at the same stake. The supremacy, as claimed by Henry, was a stumblingblock to many pious clergymen. He assumed that same *spiritual* power which the pope had usurped and exercised. But the supremacy which reverted to him on the abolition of popery, was not that exorbitant lawless power which the pope had exercised, but only the ancient legal authority and jurisdiction in matters ecclesiastical, which the kings of England had exercised over the clergy, from the first introduction of Christianity into the kingdom. Henry considered himself plainly as a pope in his own dominions. This assumption was opposed by the protestant bishops, and therefore the first parliament of Elizabeth altered the style to "supreme governor." This is a distinction without much difference: but the act expressly confined the supremacy of the crown to the *temporal and civil* government of the clergy. The supremacy of the crown, therefore, is now entirely of a temporal nature, and confined to civil affairs in the persons of both the clergy and laity. This matter is settled by the Thirty-nine Articles, and removes all doubts as to the nature of the supremacy. It extends over all men, both spiritual and temporal, in so far only as the civil sword reaches to the *persons* of ecclesiastics. It can reach no farther than this world. The power of the keys, which was committed to the church alone, and is to be exercised by the church alone, reaches to the world to come. The two powers are therefore essentially and decidedly distinct and separate, and held by separate persons, as the Articles of Religion distinctly show.

"The king's majesty hath the chief power in this realm of England, and other his dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain; and it is not, nor ought to be, subject to any foreign jurisdiction.

"Where we attribute to the king's majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended; we give not to our princes the ministering either of God's word, or of the sacraments, the which thing the injunctions also lately set forth by Elizabeth our queen do most plainly testify; but that only prerogative, which we see to have been given always to all godly princes in Holy Scripture, by God himself; that is, that they should rule all states and degrees committed to their charge by God,

whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers. The bishop of Rome hath no jurisdiction in this realm of England.\*

The supremacy is also settled and determined by the canons of the church; that is, the fundamental laws as agreed upon in both houses of convocation, and assented to by the king in the same manner as an act of parliament. The first canon says:—

“As our duty to the king's most excellent majesty requireth, we first decree and ordain, that the archbishop from time to time, all bishops, deans, archdeacons, parsons, vicars, and all other ecclesiastical persons, shall faithfully keep and observe, and as much as in them lieth shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom the ancient jurisdiction over the state ecclesiastical, and abolishing of all foreign power repugnant to the same. Furthermore, all ecclesiastical persons having cure of souls, and all other preachers, and readers of divinity lectures, shall to the utmost of their wit, knowledge, and learning, purely and sincerely (without any colour of dissimulation) teach, manifest, open, and declare, four times every year at the least, in their sermons and other collations and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor good ground by the law of God) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection within his majesty's realms and dominions is due unto any such foreign power; but that the king's power within his realms of England, Scotland, and Ireland, and all other his dominions and countries, is the highest power under God, to whom all men, as well inhabitants as born within the same, do by God's laws owe most loyalty and obedience, afore and above all other powers and potentates in the earth.”†

“No person shall be received into the ministry, nor admitted to any ecclesiastical function, except he shall first subscribe (amongst others) to this article following: That the king's majesty under God is the only supreme governor of this realm, and of all others his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.”‡

Sir Edward Coke says that the act of Elizabeth was an act of restitution of the ancient jurisdiction ecclesiastical, which always belonged of right to the crown of England. It was not introductory of a new, but declaratory of the old, and that which was, or of right ought to be, by the fundamental laws of this realm, parcel of the king's jurisdiction. By which laws the king, as supreme head, had full and entire power in all causes ecclesiastical as well as temporal. As in temporal causes, the king doth judge by his judges, in the courts of justice, by the temporal laws of England: so in causes ecclesiastical, they are to be determined by the judges thereof, according to the king's ecclesiastical laws. By a solemn decision of all the judges, it was found that the kingdom of England is an absolute empire and monarchy, consisting of one head—THE KING—and of a body politic, made up of many well agreeing members. All which the laws divide into two several parts,—THE CLERGY and the LAITY, and both of them immediately under God subject and obedient to the HEAD. The kingly head

\* 37th Article of Religion.

† Canon 1. 1663.

‡ Canon 26.

of this united body politic is furnished with prerogative and jurisdiction to render justice and right to every part and member of this body, of what estate or degree soever; otherways he would not be at the head of the whole.\*

The church of England is governed by two archbishops, and twenty-four bishops, and has twenty-six deans and chapters, sixty archdeacons, five hundred and forty-four prebendaries, and about nine thousand seven hundred rectors or vicars, many of whom have at least one curate, and many of them more, as it is physically impossible for one man to do the whole official duties of a parish in the more populous towns. The archbishops assist at the coronation of our monarchs, the archbishop of Canterbury places the crown on the king's, and York on the queen consort's head. The archbishops are the chief of the clergy in their provinces, and they have besides, their own dioceses wherein they exercise episcopal jurisdiction. They consecrate bishops, and receive appeals from inferior jurisdictions within their provinces, besides a number of other duties. They are the guardians of the spiritualities, as the king is of the temporalities of every bishopric during its vacancy. The archbishop of Canterbury has also the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them. This is the foundation of his granting special licenses to marry at any time or place, to hold two livings, and the like. On this is also founded the right he exercises of conferring degrees, in prejudice of the two universities. The archbishops and bishops also confirm young people in their several dioceses, consecrate churches and burial grounds, and ordain priests and deacons, and are obliged to visit every parish church in their diocese every three years. They also give institution, and direct induction to all ecclesiastical livings in their dioceses.

Rectors or vicars, are the parish ministers, and are so called on account of the peculiar nature of the tithes. There is also another description of ministers termed perpetual curates, whose stipends are of course inferior to that of the rectors and vicars, although many of these have benefices which are not worth £80 per annum. All these ecclesiastics, either themselves, or by curate, if they are obliged to employ one, regularly perform divine service in the parish churches, at least once, and in many cases, as in large cities and towns, three times every Sunday, and on all the other days set apart for public worship by the church of England. They also celebrate marriages and baptisms both in public and private, and church women after childbirth, visit the sick, administer the holy communion on the first Sunday of every month, and on other days, and also to the sick at their own

\* Tomlin's Law Dict.



houses. They likewise perform the last duties of the church to the dead, by reading the burial service at funerals in the churchyard.\*

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### DISSENTERS.

THE reading so large a portion daily of the Sacred Scriptures in the established church of England, is alone so great a blessing, as in the judgment of many, much more than counterbalances all the imperfections, real or supposed, with which the national church is accused. Another obvious advantage is the perpetuity of her creed and liturgy. The articles remain the same compendium of scriptural truth, the homilies the same deposite of "godly and wholesome doctrine," and the liturgy the same sublime and spiritual service as they ever were. They are all, too, as necessary for these as they were in any former times, and will be for all future generations. It is therefore devoutly to be wished that they may remain immovably fixed to enlighten and comfort the people of that favoured land, till time shall be swallowed up in eternity. In a country, however, where the right of private judgment is so fully recognised, it cannot be expected that unanimity in religious opinions should exist. In its principles the church of England is perfectly tolerant. She not only appoints large portions of the Scripture to be read in her public worship, but she directs her members "to read, mark, learn, and inwardly digest" them. There has been no mental slavery in England since the Reformation; therefore men reading the Scriptures judge for themselves. Hence there will necessarily be a diversity of private opinions respecting both doctrine and discipline.

The laws of England, therefore, consider all denominations of Christians who differ from the established church in doctrine and discipline as dissenters. These generally dissent from the established church both in the mode of worship and in government. The first time we read of dissenters in England, was in the reign of queen Elizabeth. Evans says, that "on account of the extraordinary purity which they proposed in religious worship and conduct, they were reproached with the name of *puritans*." That queen had no great favour for the puritans. She was of opinion that there was very little difference in their sentiments and

\* Claims of the Established Church.—Lloyd's Historical Account of Church Government as it was in Great Britain and Ireland when they first received the Christian Religion.—W. F. Hooke on the Establishment.—Bishop Walker's Life of Archbishop Whitgift.—Jewel's Apology of the Church of England.—Burn's Ecclesiastical Law.—Blackstone's Commentaries.—Tomlin's Law Dictionary.—Gibson's *Codex Juris Ecclesiastici Anglicani*.—Ordination Service.—Hody's History of English Councils and Convocations.—Wake's State of the Church.—Kennet's Ecclesiastical Synods.—Johnson's Vademecum.—Statutes at Large.

practices towards the civil government between them and the Jesuits, and in consequence she inflicted severe penalties upon them for nonconformity. Many of the authors of that period assert, that the puritans were a sect founded by the Jesuits; many of them, they said, were actually concealed Jesuits, for the purpose of sowing divisions in the church of England. The puritans opposed the decent, sober ceremonies of the established church, and made strenuous efforts to procure their total abolition. To this, queen Elizabeth would never agree. This dispute generated a great deal of disturbance and clamour on the part of the puritans, and severe measures to compel conformity, on the part of the crown. Their opposition to government occasioned harsh measures to be resorted to against them, and severe acts of parliament to be passed. The greater the severity of government, the deeper the prejudice of these men took root, and their peculiar opinions increased, in proportion as they were watched and controlled. "They were called puritans," says Dr Hurd, "because they aimed at a purer reformation, but the worst of all was, they wanted to reform the church without reforming themselves." Elizabeth entertained a most thorough hatred at the puritans, and showed little mercy towards them. Grindall, archbishop of Canterbury, a man of great moderation, used all his influence with the queen to soften the rigour of the act of uniformity, but she was inexorable. She inherited all her father's tyrannical temper. She fined and imprisoned these puritans; and even executed such of them as denied her supremacy, as traitors. The first congregation which met separate from the church of England was at Ryegate in Surrey, in the year 1558. They took the new order of church government, then recently established by John Calvin at Geneva, for their model, as all the numerous sects of dissenters have done. It is somewhat curious that no sect of dissenters has chosen the episcopal form of government, but all have followed the presbyterian model, having parity among ministers as the fundamental principle of their government.

The rise and increase of the puritans alarmed queen Elizabeth, and she enacted several laws against them, and more were added by her successors. She usually dictated to her parliaments, which merely registered her will without much debate or consultation. "Every person not having reasonable excuse, shall resort to their parish church or chapel, on every Sunday and holiday, on pain of punishment by the censures of the church, or of forfeiting for every offence twelve pence."\* "Every person above the age of sixteen, who shall not repair to some church, shall forfeit for every month twenty pounds. And if he shall forbear for a whole year, he shall be bound to good behaviour till he conform. Any person keeping a

\* 1 Eliz. c. 8, 14.

schoolmaster who shall not repair to church or be allowed by the bishop, the keeper shall forfeit ten pounds a-month, and the schoolmaster be imprisoned for one year.”\* “Every offender, having been once convicted, shall, without any other indictment or conviction, pay half-yearly into the exchequer £20 for every month afterwards until he conform; which if he neglected, the queen might seize all his goods, and two parts of his lands, if he had any.”†

At a convocation of the church, held the 26th of March, 1565, the necessity and propriety of the uniform use of clerical habits were pressed. Those agreeing were required to subscribe *volo*, and dissentients to write *nolo*. Out of about one hundred puritan clergy present, sixty-one wrote *volo*, but the remainder declined, exclaiming, “we shall be killed in our souls for this pollution.” These by order of the queen were suspended, and warned that a failure in compliance within three months would subject them to deprivation. It is to be remarked, that the puritans, up to this period, had not separated from the church, and their historian Neale says, that “the puritans were at a loss how to behave, being unwilling to separate from a church *where the word and sacraments were truly administered*, though defiled with some popish superstitions. But,” continues the same author, “at length, after waiting about eight weeks to see if the queen would have compassion, several of the deprived ministers held a solemn conference with their friends, in which, after prayer and a serious debate about the *lawfulness* and necessity of separating from the established church, they came to this conclusion; that since they could not have the word of God preached nor the sacraments administered without idolatrous gear, (meaning the clerical habits,) and since there had been a separate congregation in London, and another in Geneva, in queen Mary’s time, which used a book and order of preaching, administration of the sacraments and discipline, of which the great Mr Calvin had approved, and which was free from the superstitions of the English service; that therefore it was their duty, in their present circumstances, to break off from the public churches, and to assemble as they had opportunity in private houses, or elsewhere, to worship God in a manner that might not offend against the light of their consciences.”‡ It is sinful terms of communion that can alone justify separation from a true church, and the puritans, in the commencement of their schism, acknowledged the church of England to be a true church. But the puritans being determined to separate from the church, made the wearing the clerical habits a sufficient cause. “It was,” says Neale, “the compelling these things (the clerical habits) by law that made them separate.”§ After separation, there seems to have

\* 23 Eliz. c. 1.    † 29 Eliz. c. 6.    ‡ Neale’s Hist. of the Puritans, vol. i. 229.    § Ibid.

been no bond of union nor authority lodged anywhere. A contention raged as fiercely among themselves about the use of the Liturgy, as it had before been esteemed an intolerable grievance to wear a surplice. After much debate, it was determined to adopt the service-book of Geneva compiled by Calvin, but which was eventually laid aside for extemporary prayers.

On the 20th November, 1572, a number of the separated puritan divines assembled at the village of Wandsworth near London, and constituted themselves into a presbytery. These were afterwards joined by several others. They likewise chose eight lay elders, and added them to this court to compose a government. The queen getting notice of this new government, and yielding to her cherished dislike of the sect, issued a royal proclamation for putting the act of uniformity in strict execution. She also commanded an act of parliament to be passed, enacting that "if any person refusing to repair to church, shall be present at any assembly, meeting, or conventicle, under pretence of any exercise of religion, he shall be imprisoned till he conform, and if he shall not conform in three months, he shall abjure the realm; which if he shall refuse to do, or, after abjuration shall not go, or shall return without license, he shall be guilty of felony without benefit of clergy. And whether he shall abjure or not, he shall forfeit his goods, and shall forfeit his lands during life."

Neale, their historian and eulogist, in speaking of their general principles, says, "that they were not enemies to either the name or functions of a bishop, provided he was no more than a stated president of the college of presbyters in his diocese, and managed its affairs with their assistance. They did not object to set forms of prayer, provided a latitude was allowed to the ministers to alter or vary some expressions, and to use a form of their own conception before and after sermon: neither did they object to such decent and distinct habits for the clergy as were not derived from popery. But, upon the whole, they were the most resolved protestants in the nation, zealous Calvinists, warm and affectionate preachers, and determined enemies to popery, and to everything that had a tendency that way." Readily admitting the truth of Mr Neale's words, yet it seems strange that men professing attachment to episcopacy, should, for the unimportant matter of harmless articles of dress, have broke into an open schism, and established an ecclesiastical discipline in direct opposition to that to which they declared they had no objection, and to a church wherein they also declared that "the word and sacraments were truly administered." But it is to be feared that schisms and divisions in the church are derived from the same source as "wars and fightings"\* in the body politic.

\* James iv. 1.

On the accession of the illustrious house of Stuart, the puritans formed the most unbounded expectations of relief and support from the new king, who was known to be of a gentle and mild disposition. They met James on his progress to London, and presented the millenary petition. It was so called from its being said to have been signed by one thousand persons: but in fact there were no more than eight hundred names affixed to it. In this petition, they embodied all their former grievances, with many new objections to the Liturgy, and the whole doctrine and discipline of the established church. Their petition gave great offence to the two universities. They resented the attempt of the puritans to forestall the opinions of the sovereign, and prejudice him against the indigenous church, of which he was become the civil governor. They passed resolutions accordingly, depriving such of the puritan clergy as held university degrees, of their honorary titles. The petitioners, however, gained nothing by this petition. James was a mild and tolerant monarch, and, willing to show his moderation, issued a proclamation "touching a meeting for the hearing, and for the determining things pretended to be amiss in the church." This meeting or conference took place at Hampton Court, the 14th, 16th, and 18th January, 1604. Reynolds, a man of good sense and learning, with four other divines, attended on the side of the puritans. All the bishops attended on the other side. This conference, as might be expected, ended unsatisfactorily to all parties, and its conclusions were rejected by the puritans. Neither party had any very clear notions of what is now called toleration. The puritans would yield nothing, but claimed everything. They claimed especially to be exempted from the use of habits and ceremonies. With this the king would not comply. The conference was followed by a proclamation from the crown, for enforcing conformity. And fierce debates ensued among those puritans themselves, who still nominally adhered to the church, and enjoyed livings, whether they should continue in it or entirely separate from it. An act of parliament was framed, to which James gave his consent, that "no recusant, in not repairing to church, being convicted thereof, shall enjoy any public office, or shall practise law or physic, or be executor, administrator, or guardian. And if any person shall send their children over seas for education, they shall forfeit £100, such child be disabled to inherit or take any benefit by gift, conveyance, or devise."\*

The above regards all protestant dissenters in general, but there are certain other statutes which concern their teachers only. No one can take upon himself to teach or preach, without taking the oath of allegiance, and the declaration against transubstantiation. And if any person shall

take upon him to preach, or teach in any meeting in other manner than according to the practice of the church of England, he shall be liable to a penalty of £30.\* No person shall presume to consecrate and administer the sacrament before he be ordained priest according to the form and manner of the church of England.† Besides these general laws, there are two statutes which affect quakers in particular. If any person shall refuse to take the oaths of allegiance and supremacy duly tendered, he shall incur a premunire.‡ And if any person shall maintain that the taking of an oath is unlawful, and shall refuse an oath duly tendered, he shall incur a penalty of £5 for the first offence, £10 for the second, and be transported for the third.§ But by the act of toleration, they shall not incur any of these penalties, on their qualifying in the same manner as other dissenters, except that, instead of the oaths at sessions, they make and subscribe a declaration of fidelity, and subscribe a profession of their Christian belief. The Baptists are exempted from signing the 27th article of religion, relating to infant baptism, in order to conciliate their scruples on that head; in other respects they qualify the same as all other dissenting teachers.

Besides exemption from penalties, dissenters are, by the act of toleration, entitled to certain privileges. They shall not be prosecuted in any ecclesiastical court, for, or by reason of their not conforming to the church of England. But this does not exempt them from paying tithes, or other parochial duties, or any duties to the church or minister, nor from any prosecution for the same. If any dissenter, on being appointed to the office of high constable, petit constable, churchwarden, overseer of the poor, or any other parochial or ward office, should scruple to execute these offices on account of the oaths, he may execute them by deputy, provided that he takes the oaths, and is otherwise approved of. Every minister, preacher, or teacher who has taken the oaths, and subscribed the declaration against popery, is exempted from serving upon a jury, or the office of a churchwarden or overseer of the poor, or any other parochial or ward office. But the act does not extend to quaker preachers, or teachers, for they are neither in "holy orders, nor pretended holy orders."

The laws enacted during the reign of queen Elizabeth were very severe; they are now however mitigated by the act of toleration. But the necessity of supporting an established religion, whose tenets are friendly to the constitution of the state, has been felt in every period of British history. In 1643, an ordinance || of the long parliament enjoined that the

\* 22 Char. II.      † 14 Char. II.      ‡ 5 Elizabeth.      § 13 and 14 Char. II.

|| The decrees of the parliament, during all the period which it possessed the supreme power, were called ORDINANCES, being enacted and enforced by the authority of the commons alone; in contradistinction to an ACT OF PARLIAMENT, which is enacted by the king, with the advice of the three estates of parliament; the lords spiritual and temporal, and the commons.

Solemn League and Covenant should be taken throughout England and Wales. This covenant binds to the extirpation of episcopacy. Those who refused to take the covenant were disabled by other ordinances from being of the common council, from filling any office of trust in the city of London, and from practising in any of the courts of law. On the 10th June, 1643, the archbishop of Canterbury was suspended, his temporalities sequestered, and afterwards he was himself put to death. The Directory was ordered to be used in place of the Book of Common Prayer, and severe penalties were imposed on those who used the latter, even in private. The bishops were abolished, and their lands settled in trustees and sold. Classical presbyteries, and congregational elderships, were established in their place. These again very soon sank before the rising star of the independents, supported by the favour of Oliver Cromwell.

By the above mentioned acts, and also the Act of Uniformity, all dissenters were liable to certain penalties, from which, however, the toleration act has happily relieved them. This act was confirmed by the 10th of queen Anne. The toleration act exempts all dissenters from all penal laws relating to religion. But the members of the church of Rome, as well as those who denied the Holy Trinity, were excepted. All other denominations were freely at liberty to act as their consciences directed them in the matter of religious worship. The act itself is as follows:—

I. Forasmuch as some ease to scrupulous consciences in the exercise of religion, may be an effectual means to unite their majesty's protestant subjects in interest and affection. II. That none of the acts below,\* shall be construed to extend to any persons dissenting from the church of England, that shall take the oaths of allegiance and supremacy, and shall make and subscribe the declaration against popery, which oaths and declaration the justices of the peace, at the general sessions of the peace, are hereby required to tender and administer. No one shall give or pay above the sum of sixpence, nor that more than once, for his or their entry, and for making and subscribing the said oaths and declaration, nor above a further sum of sixpence for a certificate. III. All persons prosecuted or convicted under the former statutes are hereby discharged. IV. Every person taking the oaths and making the declarations, shall be free from all pains, penalties, and forfeitures enacted by 35 Eliz. c. 1. and 22 Char. II. c. 1, and from all prosecution in any ecclesiastical court. V. Provided that, if any assembly of persons dissenting from the church of England shall be held with the doors locked, barred, or bolted, during any time of the meeting, every person attending such meeting shall be liable to all the pains and penalties as before. VI. Nothing in this act shall exempt any person from paying tithes or other parochial duties, or any other duties to the church or minister, nor from any prosecution for the same. VII. Every dissenter chosen to any office, and scrupling to take the oaths, shall be allowed to serve by deputy, provided the deputy takes the oaths. VIII. No dissenter in holy orders, or pretended holy orders, nor any preacher or teacher of any congregation of dissenting protestants, that shall take the oaths and make the declaration, and shall also declare his approbation of and subscribe the Articles of Religion, except the 34th, 35th, and 36th, and these words of the 20th article, "the church hath power to decree rites or ceremonies, and authority in controversies of faith," shall be liable to any pains or penalties. IX. Provides that those taking the

\* 23 Eliz. c. 1. 29 Eliz. c. 6. 1 Eliz. c. 2. 3 Jam. I. c. 4. 3 Jam. I. c. 5. 25 Char. II. c. 2. 30 Char. II. c. 1.

oaths, &c., shall be recorded, and shall not preach with locked doors, &c. X. Makes an exception in favour of Baptist teachers or preachers from signing a part of the 27th article touching infant baptism. XI. Persons in holy orders or pretended holy orders complying as above, are exempted from serving on any jury, and from being chosen or appointed to bear the offices of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred or shire, city, town, parish, division, or wapontake. XII. Justices of the peace may tender the oaths to any dissenter, and may commit him on refusal, without bail or mainprize. XIII. Every person shall make and subscribe the aforesaid, and also this declaration of fidelity:—I, A. B., do sincerely promise and solemnly declare before God and the world, that I will be true and faithful to king William and queen Mary; and I do solemnly profess and declare, that I do from my heart abhor, detest, and renounce, as impious and heretical, that damnable doctrine and position, “that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare that no foreign prince, person, prelate, state, or potentate, hath or ought to have, any power, jurisdiction, superiority, pre-eminence, or authority ecclesiastical or spiritual within this realm.” And shall subscribe a profession of their Christian belief in these words:—“I, A. B., profess faith in God the Father, and in Jesus Christ his eternal Son, the true God, and in the Holy Spirit, one God blessed for evermore; and do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration:” which declaration and subscription shall be recorded at the quarter sessions, which shall exempt the parties from pains and penalties against popish recusants or protestant nonconformists. XIV. If any person refuse to take the oaths, &c., he shall not be admitted to make and subscribe the declarations, either before or after conviction of popish recusancy, unless he can within thirty-one days produce two sufficient protestant witnesses, to testify upon oath that they believe him to be a protestant dissenter. XV. That until such certificates are produced, the justice of the peace is required to take a recognisance with two sureties in the sum of fifty pounds, to be levied on his goods and chattels, &c., failing which to be committed to prison till he produce such certificates and witnesses. XVI. All the laws made and provided for the frequenting of divine service on the Lord’s day, commonly called Sunday, shall be still in force, and executed against all persons that offend against the said laws, except such person come to some congregation or assembly of religious worship allowed or permitted by this act. XVII. Neither this act, nor any clause, article, or thing therein contained, shall extend, or be construed to extend to give any ease, benefit, or advantage to any papist or popish recusant whatsoever, or any person who shall deny in his preaching or writing the doctrine of the blessed Trinity. XVIII. If any person at any time shall willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any teacher or preacher, such person shall find two sureties to be bound by recognisance in fifty pounds; and upon conviction shall suffer the pain and penalty of twenty pounds. XIX. No congregation or assembly for religious worship shall be permitted, until the place be certified to the bishop of the diocese, or to the archdeacon, or to the justices of the peace at the general quarter sessions, in which such meeting shall be held and registered in the said bishop’s or archdeacon’s court, or quarter sessions, for which he shall pay sixpence.\*

It was believed for many years that the toleration act only suspended the penalties, but did not take away the crime of nonconformity. It was supposed that a dissenter could be fined for refusing to serve a civil office, and at the same time incur all the penalties of the test and corporation acts, if he took upon him any such office, without taking the sacrament according to the form and custom of the church of England. About the

\* 1 William and Mary, c. 18.



year 1762 Allan Evans, Esquire, being chosen sheriff of London, refused to execute the office, upon the grounds of his being a dissenter, and of his not being able conscientiously to take the sacrament. For this he was prosecuted by the city of London, who brought the cause before the house of lords, by appeal from the commissioners' delegates, who had given judgment for the defendant. The house ordered the question to be proposed for the opinion of the judges; "how far the defendant might, in the present case, be allowed to plead his disability in bar of action." All the judges, except the baron Perrot, were of opinion, "that the corporation act expressly rendered the dissenters ineligible and incapable of serving, and that the toleration act amounted to much more than a mere exemption from the penalties of certain laws, by freeing the dissenters from all obligation to take the sacrament at church, abolishing the crime as well as the penalty of non-conformity, allowing and protecting the dissenting worship; and therefore that the defendant may plead this disability in bar of the present action." The whole of the judges' arguments were summed up by the learned lord Mansfield, and upon this ground the house of lords affirmed the judgment of the commissioners' delegates.

Ever since the toleration act was passed, it has been the invariable practice of our kings, in their speeches to their parliaments upon their accession to the throne, after declaring their affection for the church of England, and resolution to support it, to add, that they will maintain the toleration inviolable.

A protestant dissenter might sit in either house of parliament, being duly qualified, and taking the oaths. Roman Catholics did not enjoy altogether the same privileges as other dissenters. They could not sit in either house of parliament, the declaration against transubstantiation proving an effectual barrier. But all the severe restrictions to which they were formerly exposed, were removed by what may be called their toleration act. It placed them under the same protection as protestant dissenters, whilst it left them equally under the disabilities of the corporation and test acts. In the reign of George IV. an act was passed, abrogating the test and corporation laws. By a subsequent act, the act of 30 Char. II., against transubstantiation, invocation of saints, and the sacrifice of the mass was repealed, and every office under the crown laid open to all irrespectively, except that Roman Catholics are disabled from being lord chancellor of England or Ireland, or lord lieutenant of the latter kingdom.\*

The dissenters are now a numerous and very respectable body, the greatest proportion of whom are methodists of the Wesleyan and Whitfield connexion, although there are many other denominations, deriving their

\* 31 Geo. III., which see p. 327.

names from their various tenets. The descendants of the puritans are now distinguished by the several denominations of presbyterians, independents, and baptists. Each have a separate society in London, for the support of the poor ministers of their several denominations. Many of the chapels belonging to the presbyterians have fallen into the hands of the Unitarians, who are also a numerous body. Many of the laity, however, who had joined dissenting bodies from the want of church accommodation in their own parishes, returned to the church when the new churches were built in the more populous places, by parliamentary grants.\*

### THE ESTABLISHED CHURCH OF SCOTLAND.

It is now impossible to ascertain by whom, or by what means the Christian church was first planted in Scotland. It is certain that it was very early introduced. In our sketch of the church of England, we have shown that St Paul planted the church there, while the Roman armies were still in Britain. The Romans never subdued Scotland, but they penetrated a considerable way into it. It is more than probable, it is almost certain, that Christian teachers would follow in the rear of their armies. Tertullian, an ancient father, in his book against the Jews, which he wrote about the year 200, expressly mentions, "that the parts of Britain which had been inaccessible to the Romans, were subdued to Christ." The church must therefore have been planted here before the time of Tertullian. Had there been only a few individuals who had been converted to the Christian faith, it is scarcely probable that Tertullian would have asserted that the kingdom was "*subdued* to Christ." In those early days, Christianity was propagated with a rapidity of which we have now no conception. It is natural to suppose that it would require a number of years to convert a barbarous nation from gross idolatry to the worship of the true God. This appears, however, by Tertullian's account, to have been accomplished before the end of the second century. Dr Lloyd, a learned antiquary, on the authority of Bede, whom he quotes, says, that "the Scottish Picts who inhabited that part of Scotland, which was next to the Britons, received the Christian faith at their hands. Bede tells us, that in the year 412, St Ninian, a Briton, was the author of their (the Scots) conversion, and that at his preaching they left the error of idolatry, and received the belief of the truth. There is no reason to doubt, that the religion which he planted then among the Picts was the same that

\* Neale's History of the Puritans.—Burn's Ecclesiastical Law.—Tomlin's Law Dictionary.—Appendix to Dr Furneaux's Letters to Mr Justice Blackstone.—Statutes at Large.

was established at Rome itself, and in the civilized Britain, and in all other provinces of the empire.”\* This conversion happened while Britain was still under the Roman government, and long before popery was known. Ninian was ordained a bishop by Martin, bishop of Tours, in France. He erected a church at Whitehorn, in Galloway, which from its being built of white stone, was called the *candida casa*, or the white chapel. “There,” says Lloyd, on the authority of Bede, “living near the Picts, he was often conversant with them, and so had opportunity to go in unto their country: when having made a general conversion of that people, he did all the other parts of an apostle; he consecrated bishops among them; he ordained priests, and divided their country into parishes: and so having formed and settled their church, he died about eighteen years after their conversion.”† That division of the kingdom which lies north of the Grampian hills, continued in idolatry long after Ninian had settled the church in the southern division. Columba, a presbyter, has the honour of planting the church north of these hills. He, with twelve companions, settled in Hyona, about the year 563. About that time the monastic life came into fashion in Europe. By patience and perseverance Columba succeeded in converting Bridei, a prince of a powerful clan. By his *authority* his people became nominal Christians, and Christianity gradually spread through all the northern parts. He erected monasteries in different parts of the country, which became the nurseries of religion and learning. In fact, they were the schools and universities of those ages. The bishops were chosen from among those monks, and generally resided in these monasteries, and sent their clergy to officiate in sacred things at different parts of the district. The origin of small parishes, and of the first settlement of stated parochial ministers, were exactly the same in Scotland, as we have already described, under the Church of England. Patronage became an hereditary right in the same manner. It is therefore unnecessary to repeat it here.

It is certain there were monks and secular priests, who were called Culdees, not only among the Scots, but also among the Britons and Irish. Sibbald says they were originally the clerks or clergy who landed at St Andrews with St Regulus, whom the old register of St Andrews calls a bishop. He says they formed his chapter, and lived in cells, hence their name of Culdees.‡ “The convents of these Culdees,” says Goodall, “constituted the chapter, and had the election of the bishops in the several places where bishops were established. At St Andrews they continued to elect the bishops, till, in the year 1140, a priory was erected there, and filled with canons regular, who after that seem to have joined

\* Lloyd's Historical Account.

† Ibid.

‡ Sibbald's History of Fife, p. 69.

with the Culdees in the elections of bishops until the year 1273; about this time the canons jostled the Culdees entirely out of their right." Mr Pinkerton, a learned antiquary, speaking of the Culdees, says: "It is clear, from ancient charters, that far from being enemies to episcopacy, they were the very men who chose the bishops. Doubtless, he who expects to find in Scotland matters not to be found in any neighbouring country, only shows his own credulity; and that, from the fourth century, every christian country had its bishops is too well known to be insisted on. When St Martin first brought monks into Europe, about the year 380, their rigid life acquired them high esteem. In short, the bishops were chiefly chosen from their (the Culdees') order: and afterwards usurping the rights of the people, they began to choose the bishops from among themselves. Hence, in the middle ages, almost every monastery had its bishop, almost every bishopric its monastery."\*

"The Culdees were not confined to the priory of St Andrews, but were scattered over the country: and these places which are designed *Kils*, as *Kilmenie*, were their seats. They were wherever a monastery or priory came to be built afterwards; yea, in the cathedrals were some of them, as at Abernethy, Dunkeld, and Brechin. They lived at first upon the labour of their hands, and the oblations on the altar; afterwards donations were made to them."†

Spottiswood says, that Congallus, on his succession to the throne, "considering that the contempt of ministers ever breedeth contempt of religion, did carefully provide for their necessities, appointing to them mansion places at their churches where they served, and with a competent portion of land thereto adjoining, and declaring the tenth of all corns, fruits, herbs, and flocks, which did either produce or nourish—to appertain properly to the church." This is the commencement of the tithes or tiends of Scotland, but which were commuted in the stormy reign of Charles I. into an assessment on the land, payable, not in the first instance as formerly by the tenant, but by the proprietor. The favour shown to the Scottish church by its "nursing fathers," soon excited the pope's avarice and ambition. He accordingly despatched emissaries to take advantage of this new opening for his universal dominion. For several centuries the Scottish ecclesiastical history is wrapped up in all the contradictions and uncertainties of monkish traditions. We meet with little very interesting down to the era of the Reformation, except the unceasing efforts of the See of Rome to maintain its supremacy, and the unspeakable injury done to the church, by compelling the bishops to repair to Rome for consecration, and thereby to leave their flocks without a shepherd. These venerable

\* Pinkerton's *Enquiry*, vol. ii. p. 6. c. 1.

† Sir R. Sibbald's *Hist. of Fife*, pp. 72, 73.

fathers were frequently detained there for years, on some imaginary dispute. There they frequently remained so long before these disputes were settled, or before the pope would consecrate them, that death surprised them either in Rome itself, or on their journey homewards. This occasioned a new election of a bishop, a new journey to Rome, and new delays, vexations, and disputes. All these circumstances, however, added prodigiously to the pride, power, and wealth, of the Roman pontiff. But the vacant diocese in the mean time was left without a governor, and both the clergy and the people were left entirely without oversight or control.

The opinions of Wickliffe were extensively adopted in England, and even found their way into Scotland, where those who embraced them were called the "Lollards of Kyle." But the reformed doctrines were not preached openly by any person of eminence before the year 1524, when Patrick Hamilton, abbot of Ferme, publicly promulgated doctrines inimical to those of the Latin church. In the year 1542, the parliament enacted, in opposition to the protest of the spiritual estate, "that it should be lawful for all our sovereign lady's lieges, to have the holy writ of the Old and New Testaments in the vulgar tongue, of a good and true translation, without incurring any crime for hearing or reading the same." The reformed doctrines continued to gain proselytes, particularly through the exertions of John Knox, until they were embraced by the greater portion of the nation, including some of the principal nobles and gentlemen. These entered into a bond, whereby they renounced the doctrines and authority of the church of Rome, and engaged to maintain and promote the doctrines then promulgated. In the year 1558, the reformers assumed the designation of the CONGREGATION, and decreed "that in all parishes the curates should be instructed to read the common prayers and lessons of the Old and New Testament on Sundays and other festival days, according to the form set forth in the Book of Common Prayer." French troops were brought into the country, for the purpose of suppressing the Reformation and enslaving the kingdom. These were expelled by the assistance of queen Elizabeth. A parliament, or rather a convention of the three Estates, for the queen never ratified it, was called in the year 1560, which *for ever* abolished the pope's power and authority in Scotland, and prohibited the exercise of the religion of Rome under pain of death. The Estates also ratified and approved the Confession of Faith drawn up by Knox.

In the course of the same year, the FIRST BOOK OF DISCIPLINE was drawn up, approved, and subscribed, by the privy council. Knox and his coadjutors also settled the government of the church, by superintendents, parochial ministers, and readers, and divided the whole kingdom into dioceses. Spottiswood says, "the superintendents held their office during life, and their power was episcopal." Mr Erskine of Dun, one of their

number, says, "I understand that a bischope or superintendent to be but ane office, for where the ane is the uther ia." This government continued from 1560 to 1572, when a General Assembly, which met at Leith, drew up a *concordat*, in which it was agreed, "that those who had the old prelatical power were also to have the old prelatical names and titles of archbishops and bishops," and accordingly all the vacant sees were filled up. This order continued till the year 1575, when Mr Andrew Melville, in the General Assembly of that year, "propounded a question touching the lawfulness of the episcopal function." From that period the controversy between the episcopalians and presbyterians continued with much bitterness and exasperation on both sides, till the year 1580. In that year, the Assembly passed an act, declaring "the office of a bishop, as it is now used, and commonly taken within this realm, hath no sure warrant, authority, nor good ground, out of the book and scriptures of God, but is brought in by the folly and corruption of men's invention, to the great overthrow of the true kirk of God." They threatened the bishops with excommunication if they did not instantly resign their offices. This act was passed in the assembly which met in July; at that period the General Assembly met twice every year, and at the second or October meeting, the Assembly appointed a committee to erect a presbyterian government. Calderwood says, "it was thought meet that the clerk of register be requested to concur with Robert Pont and some others, or any three or four of them, to devise a plot of the presbyteries and constitution of the same as seemeth best in their judgments, to be reported again to the next General Assembly." The order, "to devise a plot of the presbyteries," was given by the Assembly in 1580. But it was the latter end of May, 1581, before the presbytery of Edinburgh was erected. It was the first in Scotland, and consisted of sixteen ministers of the city and adjacent parishes, and of some barons and gentlemen out of each as lay-elders.\* The presbyterian form of government did not, however, acquire a legal establishment till the year 1592. James VI. assented that year to an act, declaring, "that the act of parliament made in the year 1584 against the discipline of the kirk, and liberty thereof, should be abrogated and annulled, and a ratification granted of the discipline whereof they were then in practice." As soon as the presbyterian government was thus established, a commission drew up the SECOND BOOK OF DISCIPLINE, in accordance with the change in the government. "Though," says Willison, "the civil powers after the year 1560 were favourable to the Reformation; yet our reformers had great and long struggling with many who were addicted to prelacy and several

\* Calderwood's History.

popish errors and superstitions: but it pleased the Lord so far to countenance and help them, that a national covenant was framed and entered into for the support of the Reformation. This covenant was at first subscribed by the king and his household, in the year 1580, and afterwards, by persons of all ranks in the year 1581, and again by all sorts of persons in the year 1590; and *afterwards* presbyterian government, and all the pieces of reformation then attained unto, were solemnly ratified by the king and parliament in the year 1592.\* “But these bright times did not long continue; clouds did soon arise.” The presbyterian establishment continued no longer than eight years, for, in the year 1600, James restored the old titular bishops to the government of the church, and to their political station, as one of the three estates of the realm. For the complete accomplishment of his designs of re-establishing episcopacy, James convoked several assemblies, but especially that at Glasgow in the year 1610, wherein it was agreed to recognise a regular episcopacy. For that purpose, three of the titular bishops proceeded to London, and received consecration from the hands of the English bishops appointed for that purpose by the king. On their return they consecrated their brethren, which order continued till the celebrated assembly, which met at Glasgow in the reign of Charles I., anno 1638.

That assembly condemned and annulled the decisions of six general assemblies, together with the court of High Commission, the Book of Common Prayer, the Book of Canons, and the Book of Ordination. They next deposed the bishops, “declared them infamous,” and excommunicated them, and “declared them to be of those whom Christ commandeth to be holden by all and every one of the faithful as ethnics and publicans.” This excommunication has never been rescinded. At this time also the solemn league and covenant was adopted as the national bond of union, and imposed as the terms of admission to the Lord’s supper. By this covenant, those who sign it, solemnly swear “*to endeavour the extirpation of popery and prelacy.*” In the year 1641, the presbyterian became again the ecclesiastical government established by law. “Accordingly, the solemn league and covenant was again agreed upon, and sworn, in the year 1643, for maintaining, advancing, and carrying on the work of reformation in the three kingdoms. In this covenant, all ranks engaging bound themselves to personal reformation, and in their several stations to endeavour national reformation, to preserve the protestant religion, abolish popery, prelacy, superstition, schism, profaneness, and whatsoever shall be found contrary to sound doctrine, and the power of godliness.”† The present Confession of Faith was drawn up and agreed upon by the assembly of

\* Willison’s Testimony, &c., p. 5.

† Test., p. 9.

divines which met at Westminster, together with the Larger and Shorter Catechisms, the Directory for worship, with a Directory for church government, church censures, and ordination of ministers. In the year 1649, the parliament passed an act abolishing patronage, and vested in the people the right of electing their own ministers. During the protectorate, the divine right of presbytery was crushed under the iron hoof of Cromwell's dragoons. He suffered neither general assemblies, nor synods to meet, and even forcibly dissolved one assembly, and drove the ministers out of the city, "after he had invaded and oppressed the country with an army of sectaries." "The crowning of Charles II.," says Willison, "drew down the wrath of the sectarian army upon us, who invaded the land, shed much blood, conquered us, and kept us in bondage ten years. During which time, a sinful toleration of sectarian errors was granted by Cromwell and his council in Scotland." \*

On the restoration of Charles II., in 1660, he summoned a parliament, which "razed the late glorious work of the Reformation, and all its carved work broke down with hammers as it were, all at once."† The parliament, by the Act Rescissory, annulled all the parliaments from 1640 to 1661, asserted the king's supremacy in all causes civil and ecclesiastical, and declared all meetings and assemblies, leagues and covenants, without the king's authority, to be unlawful. In particular, they declared the solemn league and covenant to be unlawful, and absolved all men from all its obligations, and commanded that instrument to be burnt by the common hangman, as it had been in London. Presbytery, together with all that had been done in the late period, was overthrown with marks of the greatest indignity. Diocesan bishops were restored to their dignities and jurisdictions. And the act of 1592, and all other laws which ascribed ecclesiastical power to the presbyterian courts, were repealed. The king by proclamation declared his royal pleasure in restoring the government of the church, by archbishops and bishops, as it stood in the year 1637. Accordingly, Mr James Sharpe and other three ministers went to London, and were first ordained deacons, next priests, and afterwards consecrated bishops. On their return they consecrated others to the vacant bishoprics, and they all took their seats in parliament as one of its estates, the old line of bishops having all died out.

The ejected ministers began to preach to those who still adhered to presbytery, at first in private houses, but afterwards, as their followers increased, they preached in the open air. By an act 1670, these meetings were discharged as seditious assemblies and conventicles, under penalties which gradually increased, until at last the punishment of death and confiscation

Test., p. 12.

† Willison.



was denounced. The government enacted a toleration for these ministers and their hearers, or an *indulgence* as it was called, to some of the presbyterian ministers to preach in vacant churches, under certain limitations; such as their being confined within their own parishes, and not encouraging those of other parishes to resort to them, forbearing to lecture before sermon, not preaching in churchyards, and not admitting unindulged ministers to assist them. This toleration was cheerfully accepted by most of the presbyterians; but a party, known by the name of Covenanters, rejected and refused any toleration from a "magistrate, as a sinful encroachment upon Christ's headship over the church." Some of them "condemned the indulged so far, as to preach up a separation from them; upon which followed very sad and mournful divisions among the *people of God*, even while under violent persecution, the fruits whereof continue to this day." These covenanters, after undergoing a bitter persecution, were at last driven to take up arms against the government and in self-defence, but they were deficient in unanimity of purpose, and notwithstanding some slight successes at their first rising, they were totally defeated and dispersed at Bothwell Bridge.

On his accession, James II., by virtue of his prerogative royal, dispensed with laws at his own pleasure, and particularly suspended all the penal laws against Roman catholics. By proclamation, 1687, he suspended all the penal laws against presbyterian non-conformists, and gave liberty to all his subjects to meet and serve God in their own way and manner, either publicly or privately. Enjoining them merely, to take care that nothing be taught or preached that might anywise tend to alienate the hearts of his people from him or his government. This toleration was generally accepted, and the presbyterian ministers who were abroad returned home, and erected meeting-houses. It however made a schism in that body, and it is in the present day gravely stated, that "it is deeply to be lamented that most of the presbyterian ministers in Scotland accepted of it, and some of them sent an address to the king, thanking him in their own name and that of their brethren, for his gracious and surprising favour, and promising an entire loyalty in doctrine and practice." \*

On the Revolution which took place in 1688, the presbyterians in the five associated shires rose *en masse*, and "rabbed" out the clergy from their houses and livings, and reduced them to beggary and want. In April 1689, a convention of estates met at Edinburgh, and declared in their Bill of Rights, "that prelacy, and the superiority of any office in the church above presbyters, is, and hath been, a great and insupportable grievance and trouble to this nation, and contrary to the inclinations of

\* Test. Am. Syn. of Orig. Seceders, p. 36.

the generality of the people ever since the Reformation, (they having reformed from popery by presbyters,) and therefore ought to be abolished." Accordingly episcopacy, which had been forced upon the people at the point of the sword, during the evil days of Charles II., was formally abolished by act of parliament in July 1689, and all acts and statutes formerly passed in its favour were rescinded. The greater part of the episcopal clergy were immediately ousted from their livings, and in April 1690, all the surviving presbyterian ministers were restored to the vacant parishes. The same parliament repealed the act for the king's supremacy in ecclesiastical causes, also those against conventicles and non-conformity, and for subjecting persons to penalties for subscribing the solemn league and covenant. In the session of June 1690, the Westminster Confession of Faith was read before parliament, and ratified. Presbyterian government and discipline was at the same time established, and all the acts made against it were formally repealed. The five articles of Perth were also repealed. The General Assembly was appointed to meet for the first time under the new establishment in October 1690. At this meeting lord Carmichael was the royal commissioner. He presented William's letter to the Assembly, "expressing his affection for them, but pressed calmness and moderation in their proceedings in very strong terms, yea told them, that his authority should never be a tool to their irregular passions."

The presbyterian establishment is governed by kirk sessions, presbyteries, synods, and general assemblies. The form of worship is extemporary, "the ministers being the mouths of the people unto God." And the Directory asserts "that the liturgy hath been a great means to make and increase an idle and unedifying ministry, which contented itself with set forms, made to their hands by others, without putting forth themselves to exercise the gift of prayer, with which our Lord Jesus Christ pleaseth to furnish all his servants whom he calls to that office." And "the spirit of prayer is given unto all the children of God in some measure, for enabling of their hearts to conceive, and their tongues to express, convenient desires unto God." The Confession of Faith maintains, that "by the decree of God, for the manifestation of his glory, some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed, and their number is so certain and definite, that it cannot be either increased or diminished."—"Neither are any other redeemed by Christ, effectually called, justified, adopted, sanctified, and saved, but the elect only."—"They whom God has accepted in his Beloved, effectually called, and sanctified by his Spirit, can neither totally nor finally fall away from the state of grace, but shall certainly persevere therein

to the end, and be eternally saved." The 25th article of the treaty of union gave the presbyterian establishment a degree of security which it did not before possess. It removed much of that jealousy with which it viewed its predecessor, the humbled episcopal church. When a bill was brought into the Scottish parliament, to grant the episcopalians a toleration, and relieve them of the persecution they then sustained, the presbytery of Edinburgh presented so violent a remonstrance that the bill was withdrawn. In their remonstrance the Assembly declared, "that to grant any toleration to those of the episcopal way was to establish *iniquity* by law."

In our account of the united church of England and Ireland, we have shown that persons presented to a benefice are tried, ordained, admitted and inducted by a bishop. In the establishment of Scotland, the same processes are performed by a college of presbyters, acting by their moderator. In both cases the idea of an establishment implies that in the admission of its ministers, the civil and ecclesiastical laws should concur. Principal Hill has arranged this information under four heads, and whose respectable authority we here chiefly follow: I. Trial of qualifications. II. Presentation. III. The call, or voice of the people. IV. The deed of the presbytery.

1. TRIAL OF QUALIFICATIONS.—The laws of the state require that the candidate shall take the oath of allegiance. The ecclesiastical laws require the presbytery to try, examine, and finally decide, regarding his doctrine, literature, and moral character. On any of these points no appeal is permitted from an ecclesiastical to a civil court. The previous education, amount of testimonials from professors in any of the universities, the nature of the exercises for trial, and several other minor requisites for a license, are all fixed by standing laws. After a full course of philosophy in one of the universities, and the study of divinity for the prescribed time, a student may be proposed to a presbytery for trial. Previous to which, however, the consent of the synod must be obtained. Should any report unfavourable to the student's character be communicated to the synod by any presbytery within its jurisdiction, his trials cannot proceed till inquiry is made. A student suffering oppression or injustice in his trials from the presbytery, has the right of appeal to the synod, and eventually to the general assembly. Licenses to preach granted by English dissenting classes, or by any foreign Christian communities, are not recognised by the Scottish establishment. "The general assembly did, and hereby do, enact and prohibit all persons educated or residing within the bounds of this church, from going out of its bounds to obtain licenses to preach; and prohibit all preachers, licensed by this church, from going without its bounds to obtain ordination, unless they are called to a particular congregation in another country. And enacts, that licenses obtained in this manner shall not be received, or have any effect in this church; and such preachers as contravene this act, shall forfeit the license formerly given them, and be no longer entitled to the privileges which belong to a preacher of the gospel in this church."<sup>\*</sup>

By act of assembly† no person can be licensed, ordained, or admitted, respectively, unless they subscribe the following formula, by which they testify their attachment to the doctrine, worship, discipline, and government of the established church: "I do hereby declare, that I do sincerely own and believe the whole doctrine contained in the Confession of Faith, approved by the general assemblies of this national church, and ratified by the law in the year 1690, and frequently confirmed by divers acts of parliament since that time, to be the truths of God; and I do own the same as the confession of my faith. As likewise I do own the purity of worship presently authorized and practised in this church; and also the presbyterian government and discipline, now so happily established therein: which doctrine, worship, and church government, I am persuaded are founded upon the word of God, and agreeable thereto. And I promise, that, through the grace of God, I shall firmly and

\* Act ix. General Assembly 1779.

† Act x. Assembly 1711.

constantly adhere to the same; and to the utmost of my power, shall in my station, assert, maintain, and defend the said doctrine, worship, discipline, and government of this church by kirk sessions, presbyteries, provincial synods, and general assemblies: and that I shall in my practice conform myself to the said worship, and submit to the said discipline and government, and never endeavour, directly or indirectly, the prejudice or subversion of the same. And I do promise that I shall follow no divisive courses from the present establishment in this church; renouncing all doctrines, tenets, and opinions whatsoever contrary to, or inconsistent with, the said doctrine, worship, discipline, and government of this church."

In this early stage, candidates are denominated *PROBATIONERS*. They are un'er the inspection, and in some respects subject to the orders of the presbytery within which they reside. During the period of their probation they are not authorized to administer the sacraments, but are licensed to preach. A *title* is not necessary, as in England, before obtaining orders. A probationer, therefore, remains without any regular employment or fixed charge, until he receive a presentation. But he may assist any settled minister who is disabled by age or sickness. When he is presented by a patron to a charge, he undergoes a second trial, and again subscribes the above formula. If the presbytery declare him to be unqualified either in doctrine, literature, or moral character, his presentation is void. But the synod or assembly may reverse this decision on appeal, and then the presentation is good.

II. *PRESSENTATION*.—The assembly of the year 1565, expressed their opinion on this head to queen Mary, as follows: "Our mind is, not that her majesty, or any other patron, should be defrauded of their just patronages; but we mean, whensoever her majesty, or any other patron, do present any person unto a benefice, that the person presented should be tried and examined by the judgment of learned men of the church, such as are the present superintendents; and as the presentation unto the benefice appertains unto the patron, so the collation, by law and reason, belongs unto the church; and the church should not be defrauded of her collation, no more than the patrons of their presentation; for otherwise, if it be lawful to the patrons to present whom they please, without trial or examination, what can abide in the church but mere ignorance?" An act of parliament in 1567, ordains that "the presentation of laik patronages alwaies (shall be) reserved to the just and ancient patrones; and that the patron present ane qualified person within sex monethes to the superintendent of thay partis quhair the benefice lyes."\* The act which established the presbyterian government in 1592, ordains that all the presentations to benefices, which had up to that date been executed by the bishops, were to be devoted to the presbyteries; who were "bound and astricted to receive and admit quhatsumever qualified minister was presented be his majestie or laik patrones."†

At the Revolution, when the presbyterian government was again established, an act of parliament constituted the heritors and kirk session of every parish patrons.‡ This act was repealed by the following act: "Whereas by the ancient laws and customs of that part of Great Britain called Scotland, the presenting of ministers did of right belong to the patrons untill, by the late act of William and Mary *concerning patronages*, the presentation was taken from the patrons and given to the heritors and elders of the respective parishes; and in place of the right of presentation, the heritors and liferenters of every parish were to pay to the respective patrons a small and inconsiderable sum of money, for which the patrons were to renounce their presentation in all time thereafter, &c. And whereas that way of calling ministers has proved inconvenient, and has not only occasioned great heats and divisions among those who by the aforesaid act were entitled and authorized to call ministers, but likewise has been a great hardship upon the patrons, whose predecessors had founded and endowed those churches, and who have not received payment or satisfaction for their right of patronage from the aforesaid heritors or liferenters of the respective parishes, nor have granted renunciations of their said rights on that account. Therefore the aforesaid act *concerning patronages* is repealed and made void; and that in all time coming the right of all and every patron to the presentation of ministers to churches and benefices, and the disposing of vacant stipends for pious uses within the parishes, be restored, settled, and con-

\* Act 1567, c. 7.

† Act 1592, c. 114.

‡ Act 1690, c. 23.

firmed to them; and that from and after the 1st of May 1712, it shall and may be lawful for her majesty, her heirs and successors, and for every other person who has a right to any patronage (who have not made and subscribed a formal renunciation thereof under their hands) to present a qualified minister to any church whereof they are patrons which shall happen to be vacant; and the presbytery of their respective bounds shall and is hereby obliged to receive and admit in the same manner such qualified person or minister as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted."\* One of the sections of this act provided, "that in case the patron of any church shall neglect, or refuse to present a qualified minister to such church that shall at any time be vacant, for the space of six months after such vacancy shall happen, the right of presentation shall accrue and belong from that time to the presbytery of the bounds where such church is, who are to present a qualified person for that vacancy, *tanquam jure devoluto*."

This act of the legislature was complained of as a grievance and a direct invasion of the privileges of the establishment. The general assembly made many ineffectual efforts to obtain its repeal, during the greater part of the eighteenth century. In their annual instructions to the commission of assembly, they directed that body which acts in the interval, to seize every favourable opportunity of making due application to the king and parliament for redress. On this subject parliament has ever been inexorable. But an act was passed by the General Assembly in 1834, bestowing upon the heads of families in a parish the right of rejecting a presentee, without assigning any reason. This important act does away with much that was objectionable in the act of queen Anne. Lord Moncrief had the honour of introducing it, which he did by stating that it was a fundamental law of the church, that no minister should be intruded upon a parish contrary to the will of the congregation. His motion was as follows: "That the General Assembly do declare, that it is a fundamental law of this church, that no pastor shall be intruded on any congregation contrary to the will of the people; and that, in order to carry this principle into full effect, the presbyteries of the church shall be instructed, that if in moderating a call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation, and in full communion with the church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the presbytery rejecting such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned; but that, if the major part of the said heads of families shall not disapprove of such person to be their pastor, the presbytery shall proceed with the settlement according to the rules of the church; and further declare, that no person shall be held to be entitled to disapprove, as aforesaid, who shall refuse, if required, solemnly to declare, in presence of the presbyteries, that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or congregation." This motion was carried by 184 against 138, and has now become the law of the church.

A series of regulations for giving effect to this decision was afterwards moved in the Assembly, and were in substance as follows: "The persons entitled to object to a presentee are the male heads of families in full communion with the church. The presentee having preached at least once before the congregation, the said communicants, on the day appointed for moderating the call, may allege special objections to his morals or doctrine, or his sufficiency and fitness for the particular charge; and these must be substantiated in the usual way to the satisfaction of the church courts. Secondly, the said communicants may express 'dissent' without reason given, either *vis à voce* or in writing: if the dissentients are less than one-half of the qualified communicants, their opposition is no bar to the appointment of the presentee: if they form an apparent majority, the presbytery is to adjourn proceedings to a second meeting, at the distance of ten days, and in the interval, if they see proper, or are requested, may appoint him to preach again to the congregation. At the adjourned meeting, former dissents may be withdrawn, but no new ones can be tendered without reasons given, and in this case the presbytery decides on their competence. If the dissentients

then persist in their dissents, and are found to be a majority of the congregation, the presentation falls to the ground; but at the demand of the patron, or presentee, or any member of the presbytery, any or all of the dissentients may be cited to appear at a third meeting, ten days from the second, and purge themselves of impure motives, by declaring that they are not actuated by private malice, but by a conscientious regard to the spiritual interests of themselves or the congregation. Any person so cited, neglecting to make the declaration, is struck off the list of dissentients. When the patron names a second presentee, the same proceedings are repeated: and if he and the parishioners cannot come to an understanding within the usual period of six months, the *jus devotutum* of the presbytery comes into operation. Against the presentee named by it no dissent without reason given is available, but the presentation is conducted in the old form. A roll of the qualified communicants is to be kept by the session clerk, and revised annually in November after the sacrament."

**III. THE CALL, OR VOICE OF THE PEOPLE.**—The general assembly of 1834, as we have seen in the foregoing section, passed an act conferring on the heads of families the right of rejecting a presentee without assigning any reason. Up to this period, the power of parishioners regarding the settlement of their minister was merely nominal, for although the formality of "a call" was regularly gone through, it could be considered in no other light than a formality, so long as the power of rejection was withheld from them. The order of making a call has not been altered by the recent enactment, and is as follows: Before undergoing his second trial, a probationer if presented is appointed by the presbytery to preach in the parish church, on a day at least ten days afterwards. On which day, the presbytery assemble at the church of the parish to be filled, whether the presentee be an ordained minister or a probationer. One of their number, by appointment, then preaches a sermon suitable to the occasion. The people are then informed that the probationer or minister has been presented by the patron. They are next asked to subscribe a paper named a CALL. This call is an invitation to the presentee to become their minister, and a promise of subjection in the Lord. This is a custom commensurate with the presbyterian government. It is meant to be an encouragement for the labours of their future minister, by an expression of the approbation of the people. One of the legal steps, therefore, in the settlement of a minister, is a sentence of the presbytery sustaining the call.

The constitution of the establishment provides another method for making the voice of the people legally known in the admission of their minister. This is by conferring the right on the parishioners of appearing as the presentee's accusers. They may at any time during his trials, give a written accusation to the presbytery, charging him with immorality of conduct, or of unsoundness of doctrine. When this accusation is presented, the parishioners bind themselves to prove it, under pain of ecclesiastical censures. This is a bar to the settlement till the accusation be discussed. After the trials of the presentee are finished, a paper called an *edict* is read from the pulpit, summoning all who have any objections to the life or doctrine of the presentee to appear on the day appointed for his ordination. The day of ordination is appointed at not less than ten days from the day on which the edict was read; when those preferring charges may state their objections orally, without the formality of writing. If the charge is frivolous, the presbytery will disregard it; and as proof must be instantly produced, the edict does not afford any occasion of vexatious delay. This exhibits the jealousy with which the constitution watches over the qualifications of candidates, and furnishes a lesson of circumspection to all who direct their views to the ministry.

**IV. DEED OF THE PRESBYTERY.**—On the day appointed for the ordination, the presbytery again meets at the church to be filled, to complete the settlement of the presentee, provided no bar has arisen in consequence of the edict. After an appropriate sermon, one of the members of presbytery, who has been appointed for the duty, asks at the probationer the following questions:

"1. Do you believe the Scriptures of the Old and New Testament to be the word of God, and the only rule of faith and manners? 2. Do you sincerely own and believe the whole doctrine contained in the Confession of Faith, approved by the general assemblies of this church, and ratified by law in the year 1690, to be founded upon the word of God? And do you acknowledge the same as the confession of your faith; and will you firmly and

constantly adhere thereto, and to the utmost of your power assert, maintain, and defend the same, and the purity of worship as presently practised in this national church, and asserted in the 15th act of assembly 1707! 3. Do you disown all Popish, Arian, Socinian, Arminian, Bourignonian, and other doctrines and opinions whatsoever, contrary to, and inconsistent with, the foresaid confession of faith? 4. Are you persuaded that the presbyterian government and discipline of this church, are founded on the word of God, and agreeable thereto? And do you promise to submit to the said government and discipline, and to concur with the same; and never endeavour, directly nor indirectly, the prejudice or subversion thereof, but, to the utmost of your power, in your station, to maintain, support, and defend, the said discipline and presbyterian government, by kirk-sessions, presbyteries, provincial synods, and general assemblies, during all the days of your life! 5. Do you promise to submit yourself willingly and humbly, in the spirit of meekness, unto the admonitions of the brethren of this presbytery, and to be subject to them, and all other presbyteries and superior judicatures of this church, where God in his providence shall cast your lot; and that according to your power you shall maintain the unity and peace of this church against error and schism, notwithstanding of whatsoever trouble or persecution may arise; and that you shall follow no divisive courses from the present established doctrine, worship, discipline, and government of this church! 6. Are not zeal for the honour of God, love to Jesus Christ, and desire of saving souls, your great motives and chief inducements to enter into the functions of the holy ministry, and not worldly designs and interest? 7. Have you used any undue methods, either by yourself or others, in procuring this call? 8. Do you engage, in the strength of Jesus Christ our Lord and Master, to rule well your own family, to live a holy and circumspect life, and faithfully, diligently, and cheerfully, to discharge all the parts of the ministerial work, to the edification of the body of Christ! 9. Do you accept of and close with the call to be pastor of this parish, and promise through grace, to perform all the duties of a faithful minister of the gospel among this people?" These questions were decreed to be asked of candidates by the general assembly of 1711, and correspond with the general instructions annexed to the Confession of Faith.\* The nature of the questions clearly indicate the answers, which having been made to the satisfaction of the presbytery, they proceed to his ordination. This is done by prayer and imposition of hands. The directory appoints the parish to observe a solemn fast; that they may the more earnestly join in prayer for a blessing upon the ordinance. After the foregoing questions have been asked, and the answers given: the minister who presides is directed "to demand of the people concerning their willingness to receive and acknowledge him (the presentee) as the minister of Christ; and to obey and submit unto him, as having rule over them in the Lord; and to maintain, encourage, and assist him in all the parts of his office. Which being mutually promised by the people, the presbytery, or the ministers sent from them for ordination, shall solemnly set him apart to the office and work of the ministry, by laying their hands on him, which is to be accompanied with a short prayer or blessing to this effect:

"Thankfully acknowledging the great mercy of God in sending Jesus Christ for the redemption of his people; and for his ascension to the right hand of God the Father, and hence pouring out his Spirit and giving gifts to men, apostles, evangelists, prophets, pastors, and teachers; for the gathering and building up of his church; and for fitting and inclining this man to this great work: (*Here let them impose hands on his head*) to entreat him to fit him with his Holy Spirit to give him (who in his name we thus set apart to this holy service) to fulfil the work of his ministry in all things, that he may both save himself and his people committed to his charge."†

After the imposition of hands, the presiding minister, in the name of the presbytery, receives and admits the newly made minister to be the minister of the vacant parish. By this admission the presbytery, in execution of the office committed to them as a branch of the established church, constitute a connexion between him and the inhabitants of that parish. This deed gives him a legal title to the emoluments provided by law. While he holds this

\* Hill's View of the Constitution, &c.

† Directory.

living he is incapable of taking any other charge with cure of souls. Death, resignation, deposition, or translation, can alone dissolve this connexion. The former procedure relates to probationers: in a case of translation, when the minister has already been ordained, it is not competent to repeat the ordination. He is, however, in the face of his new congregation, to give his consent and adhesion to the declarations, promises, and engagements, made at his ordination. He is then received and admitted minister of the parish.\*

In the Directory, the presiding minister is instructed to exhort the minister, briefly, "to consider of the greatness of his office and work, the danger of negligence both to himself and people, the blessing which will accompany his faithfulness, in this life and that to come; and withal, exhort the people to carry themselves to him, as to their minister in the Lord, according to their solemn promise made before. And so, by prayer, commending both him and his flock to the grace of God, after singing of a psalm, let the assembly be dismissed with a blessing.

"If a minister be designed to a congregation, who hath been formerly ordained presbyter according to the form of ordination which hath been in the church of England, which we hold for substance to be valid, and not to be disclaimed by any who have received it: then there being a cautious proceeding in matters of examination, let him be admitted without any new ordination." The Directory ordains—"that preaching presbyters, orderly associated, either in cities or neighbouring villages, are those to whom the imposition of hands doth appertain, for those congregations within their bounds respectively. In extraordinary cases something extraordinary may be done, until a settled order may be had, yet keeping as near as may be to the rule. There is at this time (1648) as we humbly conceive, an extraordinary occasion for a way of ordination for the present supply of ministers." The Directory also provides, in addition to his other qualifications, that when he applies to the presbytery for a license, he produce testimonials of his having signed the covenant of the three kingdoms

**GOVERNMENT.**—The constitution of the Scottish establishment is composed of four distinct courts rising progressively. These are, I. the Kirk Session; II. the Presbytery; III. the Synod; IV. the General Assembly.

**I. THE KIRK SESSION.**—This is the lowest court or judicatory. Its constituent members are the minister, who is by custom officially the moderator, or president, and lay elders. Elders are chosen by the session. After their election, the minister reads their names from the pulpit, from a paper called an edict; at the same time he appoints a day, at the distance of not less than ten days, for their admission. If no objections are offered on that day by any of the congregation, or if those that are offered are found to be frivolous, the minister proceeds, in the face of the congregation to admit the new elders. They are placed in a pew opposite the pulpit; the minister offers up a prayer, followed by an exhortation to them. He then addresses the congregation, recommending the new office-bearers to their respectful attention. At the time of their admission, the minister calls on them to declare explicitly their assent to all that is contained in the Confession of Faith. He asks the same formula of questions at the elder, as are asked at the probationer on his ordination. The minister does not lay on hands on the elder, but he descends from the pulpit and shakes hands with him. All the elders already made do the same,

\* Hill's View of the Constitution of the Church of Scotland.



which completes the ceremony. The session is legally convened, when summoned by the minister from the pulpit, or when personally cited. But it cannot exercise any judicial authority, unless the minister of the parish or some other minister, acting either in his name or by appointment of the presbytery, constitutes the meeting by prayer, and presides during its deliberations. His business is to assist the minister in overseeing and correcting the manners of the people. They catechise the youth and visit the sick. They distribute the elements to the communicants. They have a vote in all business which may come before the parish session. One of the session is chosen by their brethren to attend with the minister at the presbytery and the synod. And in all matters of government and discipline they have an equal vote with the minister. Every parish is divided into districts, in each of which there is an elder to oversee it. The session meets once a-week, but its jurisdiction does not extend beyond its own parish. The minister, who is perpetual moderator, can summon a session when he pleases; in which, however, he has no negative voice. If absent the elders can meet without him about the affairs of the poor. But in matters of scandal, they must apply to the presbytery to send a minister to hold a session, or wait the return of their own minister. The kirk session can judge in matters of lesser scandal, such as fornication; but the greater, such as adultery, must be remitted to the presbytery. They suspend from the Lord's supper. They provide all the necessaries for the communion. They collect, keep, and distribute the poor's money. They keep a register of births and marriages, and another of their own proceedings, which they must lay before the presbytery. Appeals lie from them in all cases to their own presbytery. No parish has less than two or three, and in Edinburgh each parish has twelve, elders, except St Cuthbert's, which from its immense population has upwards of fifty. The elders are grave, sober, and orthodox members, chosen from the heads of families, who solemnly engage to use their utmost endeavours to suppress vice and to cherish piety and virtue.

II. PRESBYTERIES.—The kingdom of Scotland is divided into seventy-eight presbyteries. The number of parishes composing a presbytery is indefinite. It consists of *all* the ministers within a certain district, and *one* ruling elder from each parish, who represents that parish. In some of the populous districts there are thirty ministers in a presbytery. In some remote situations, where the parishes are of great extent, there are not more than four. Professors of divinity, in any university within the bounds of the presbytery, if they be ministers, are *ex officio* members. In populous places presbyteries meet once a-month. Those in remote districts seldom meet above four or five times a-year. They meet generally in the principal town within the presbytery, and it is generally designated by the

name of that town. They choose a moderator half yearly. He must be a minister, but is merely a *primus inter pares*. When urgent business requires it, the moderator can summon a meeting of presbytery between the regular times of meeting. This is called a *pro re nata* meeting. The adjacent presbyteries usually send commissioners to each other, who may vote in the presbytery to which they are sent. By this means they can ask advice of each other in difficult cases, and report their own determinations in parallel ones. At ordinary meetings there is always a sermon: and the meeting is constituted by prayer. The roll of the members' names is then called, and the absentees marked, who must account for their absence. Presbyteries have no jurisdiction beyond their own bounds. They determine appeals from kirk sessions, but cannot try anything in the *first* instance which is cognizable by the kirk sessions. They compose all differences between ministers and people, for which purpose they can hold presbyterial visitation of parishes. They inquire into repairs of churches, and see that glebes and mansees suffer no dilapidation. They appoint schools in all parishes, and the schoolmasters are subject to their censure and examination. They only can inflict the greater excommunication. They license probationers, ordain ministers, suspend and depose them; in short, determine all ecclesiastical matters within their bounds. An appeal lies in all cases from the presbyteries to the synod. It is begun, adjourned, and dissolved, by prayer.\*

The supreme power of the presbyterian church is, under Christ, radically and originally in the presbyteries. General assemblies possess power only derivatively, and as they *represent* all the presbyteries. A presbytery is one of the most specific, essential, and indispensable parts of the presbyterian constitution. Provincial synods can only meet twice, and the General Assembly now only once a-year. The commission of the General Assembly is liable to interruption. The sudden dissolution of an assembly may prevent its very existence. This dissolution happened in 1692, by royal authority, and of course no commission was appointed that year. But a presbytery is a constant current court. They meet when they choose. They sit as long as they like. They adjourn to any place, at any time, how long, how short time soever they themselves choose. They have all the substantial power of government and discipline. They have really a legislative power. They can make acts to bind themselves and all within their bounds. They have a large share of the executive also. They can examine, ordain, admit, suspend, and depose ministers. They can cite, judge, absolve, condemn, excommunicate, their people. And if the General Assembly should enact any law, of which a majority of the presby-

\* Chamberlayne's Present State of Great Britain.

teries disapprove, it would not be obligatory. In support of this we cite the act commonly called the "Barrier Act."\*

"The General Assembly, taking into their consideration the overture and act made in the last assembly concerning innovations, and having heard the report of the several commissioners from presbyteries, to whom the consideration of the same was recommended, in order to its being more ripely advised and determined in this assembly, and considering the frequent practice of former assemblies of this church, and, that it will mightily conduce to the exact obedience of the acts of assemblies, that general assemblies be very deliberate in making of the same, and that the whole church have a previous knowledge thereof, and their opinion be had therein, and for preventing any sudden alteration, or innovation, or other prejudice of the church, in either doctrine, or worship, or discipline, or government thereof, now happily established: do therefore appoint, enact, and declare, that before any general assembly to this church shall pass any acts which are to be binding rules and constitutions to the church, the same acts be first proposed as overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several presbyteries of this church, and their opinions and consent reported by their commissioners to the next general assembly following, who may then pass the same in acts, if the more general opinion of the church, thus had, agree thereto."

III. THE SYNOD.—The synods are composed of several adjacent presbyteries. From three to eight presbyteries, according to local arrangement, may compose a provincial synod. Of these superior courts there are in all fifteen. The synod meets twice a-year, at the principal town within its bounds. The meeting is opened by a sermon, preached by the preceding moderator, whose name and text are registered. The members of the synod are the same that compose the presbyteries. Every minister of all the presbyteries within the bounds of the synod, is a member of that court, and the same lay elder who last represented the kirk session in the presbytery is its representative in the synod. By this arrangement the number of ministers and elders may be equal. They choose a moderator, who must be a minister, at every half-yearly meeting of the court, who is their president, but has no negative. The synod sends to and receives correspondents from neighbouring synods, in the same manner as the presbyteries do. The correspondents are one minister and one elder, who are entitled to sit, deliberate, and vote with the original members. Appeals lie to the synod from the presbyteries in all cases whatsoever. If the plurality of the presbyteries desire it, the moderator must call a *pro re nata* or intermediate meeting of synod. Presbyteries are subject to the

\* 9 Act of Assem. 1697.

privy censures of the synods, as ministers are to those of the presbyteries. At every ordinary session a diet is appointed, in which (when necessary) these privy censures are administered. A synod has its own clerk and officers. All the acts of the synods are subject to the review of the general assembly; for which reason they keep exact registers of all their proceedings. The synod is itself a court of review over the two inferior judicatories.\*

**THE GENERAL ASSEMBLY.**—This is the court of last resort, to which appeals lie from all the provincial synods. An appeal may rise progressively from a kirk session, through the presbytery and the synod, to the assembly general. The sentence of this court is, however, final. When a party conceives that the judgment of an inferior court is unjust or erroneous, he is entitled to seek redress by appealing to the court immediately above it. The appeal, if regularly conducted, stops the final execution of judgment. It brings the whole proceedings of that court under review, and sists the members at the bar of the superior court. The courts appealed from are not entitled to deliberate and vote in the review of their own judgment. They are called to state, in such a manner as they think proper, the reasons on which their judgment proceeded. The sentence appealed from is commonly defended before the superior court, both by the appellant and also by the members who pronounced it. If the inferior court has acted according to the best of its members' judgment, and with a good intention, they incur no blame, even if their sentence should be reversed. They are answerable to the superior court for every part of their conduct in the business reviewed, and if deserving, they are censured.

There were 936 beneficed ministers before the recent act of Assembly admitted the ministers of chapels of ease to seats in the courts. All these now possess ecclesiastical authority, and personally attend the presbyteries and synods. But they sit in the supreme court of assembly, by representation. The representation of the presbyteries is in proportion to the number of parishes within each presbytery. This was settled soon after the revolution, by act of assembly:

“That all presbyteries consisting of twelve parishes, or under that number, shall send in two ministers and one ruling elder; that all presbyteries consisting of eighteen parishes, or under that number, but above twelve, shall send in three ministers and one ruling elder: that all presbyteries consisting of twenty-four parishes, or under that number, shall send in four ministers and two ruling elders; and that presbyteries consisting of above twenty-four parishes, shall send five ministers and two ruling elders: that collegiate kirks, where there use to be two or more ministers,

\* Chamberlayne's Present State of Great Britain. Dr Hill's Constitution.

are, so far as concerns the design of this act, understood to be as many distinct parishes ; and that no persons are to be admitted members of assemblies, but such as are either ministers or ruling elders."

The number of ministers in the city of Edinburgh increased after the passing of the above act. A special act was therefore made to meet the case.\* "That each presbytery whose number doth exceed thirty ministerial charges, shall send to the General Assembly six ministers and three ruling elders." The sixty-six royal burghs of Scotland are represented by sixty-seven ruling elders. Edinburgh sends two, and each of the other burghs one ruling elder. There are five universities, each of which is represented by one of its own members, who may be either a minister or an elder. At present, therefore, the establishment is represented as follows :

200	ministers	representing	presbyteries.
89	lay elders	do.	do.
67	lay elders	representing	royal burghs.
5	ministers or elders	representing	universities.
361	members of Assembly.		

"The General Assembly," says Dr Hill, "so reputable from the number and the description of the persons who compose it, is honoured with a representation of the sovereign by the lord high commissioner, whose presence is the gracious pledge of protection and countenance to the established church, and the symbol of that sanction which the civil authority of the state is ready to give to its legal acts. The church of Scotland claims the right of meeting in a general assembly as well as in inferior courts, by its own appointment ; but it also recognises the right of the supreme magistrate to call synods and to be present at them ; and the two rights are easily reconciled, when there subsists between the church and the state that good understanding which the true friends of both will always study to cultivate." The establishment repudiates the idea of the king's supremacy in *theory*, but submits to it in *fact*. The king neither claims nor exercises any other supremacy over the church of England, than he quietly exercises over that of Scotland. He sends no royal commissioner to the convocation, but the General Assembly can neither meet nor deliberate without the presence of that functionary. When presbyterian government was for a short time established in 1592, the act of parliament of that year declares, "that it shall be lawful for the kirk and ministers, every year at the least, and oftener *pro re nata*, as occasion and necessity shall require, to hold and keep general assemblies." The act of parliament which restored presbytery after the revolution,† "appoints the first meeting of the

\* 6 of Assembly, 1712.

† June 7, 1690.

General Assembly of this church, as above established, to be at Edinburgh the third Tuesday of October next to come, in this instant year 1690." By authority of these acts of parliament, the Assembly meets now once a-year, in May. In the earlier periods of our history subsequent to the Reformation, the Assembly met twice a-year, in May and October. It never met, however, without the royal authority. To preserve this supremacy and authority, a commissioner was always appointed to represent the sovereign.

The Assembly always meets on a Thursday, on which day a moderator is chosen, who is now always a minister, but laymen have been moderators. The celebrated George Buchanan was once moderator of Assembly. It has a respectable establishment of clerks and officers, and its sittings continue ten days. The times for the election of members, and the forms of the instruments of their election, which are called their commissions, are precisely regulated by acts of Assembly. A strict conformity is indispensable. On the evening preceding the meeting of Assembly, the commissions are lodged with the clerks, who prepare from them a roll of the Assembly. An informality in the commission will prevent the member from taking his seat. On the first day of the meeting, the lord commissioner holds a levee at Holyrood house, after which he goes in state to the ancient cathedral church of St Giles. The moderator of the last Assembly preaches a sermon before his grace. After which, his grace proceeds in state to the assembly house, and takes his seat on a throne. It is to be remarked that the commissioner, as his sovereign's representative, has, during his office, ducal rank, is styled *grace*, and takes precedence for the time being of all other noblemen. The moderator of the last Assembly opens the present one with a prayer. The clerks read the roll of the names of members. Last of all, a new moderator is chosen, who immediately takes his seat a little lower than the throne, as president. His grace exhibits his majesty's commission, and a letter from the king to the Assembly. The principal clerk reads both the commission and letter, and a vote of the house orders them to be recorded. The commissioner then makes a speech from the throne, to which the moderator replies. The court is now constituted. A committee is next appointed, to prepare an answer to the king's letter, and an address, if the "signs of the times" require it. Another committee is appointed to examine commissions. The whole house is divided into two great committees—one the committee on bills, and the other on overtures. As we mentioned before, the convocation, like the English parliament, sits in *two* houses. The Assembly general, which was common both to popish and episcopalian times, follow the plan of the parliament, and sit in one house. In the Scottish parliament there were the lords of the articles, to prepare bills for debate; corresponding to this

institution, the Assembly has its committees of bills and overtures. On Friday, the session is entirely occupied in calling over the names on the committees, and, by two members selected by the moderator, reciting extempore prayers. These two committees hold their first meeting on the evening of Friday, the second on the evening of Saturday, and the third on the evening of Monday. All the business of the Assembly must come through them. All bills from the inferior courts are submitted to the committee on bills. All overtures or propositions, from synods, presbyteries, or individual ministers, for any new law, repeal of an old, or for the regulation or exercise of ecclesiastical authority, are presented to the committee on overtures. Either committee may refuse to transmit what is laid before them to the Assembly. But they cannot absolutely exclude a bill or overture: it can be introduced under the form of a protest. On Friday, ministers are selected to preach before his grace on the two following Sundays. On Saturday, the letter to the king, and the address, if any, is brought up, passes through the committee of overtures, and forms the commencement of their report. The second part of their report is the objections, if any, to the commissions, presented by that committee. This occupies the Assembly's attention, and must be discussed before they can enter on any other business. After the objections to commissions have been discussed, the Assembly receives other parts of the report of the committee on overtures, and also that on bills. They then proceed to make such arrangements as the nature and extent of these two reports render expedient. This is done on Saturday, if there is time; if not, on Monday.

On Monday, after all these preliminaries, the business of the Assembly commences. In discussing which, the forms necessary in all great meetings are adopted, and which, supported by the authority of the moderator, and the general good feeling of the house, is generally sufficient to preserve decorum and order. The sense of the house on a division is collected by one of the clerks calling the names on the roll. The votes are then marked by the clerk as they are given, under the inspection of the moderator.

When the Assembly judge private causes, counsel are heard at the bar; but when discussing overtures, which are matters purely of internal regulation, counsel are not allowed to speak. Questions discussed in an ecclesiastical court are generally more of a local than of a general interest. Still it does sometimes happen, that discussions in the Assembly are of such a general nature as to excite considerable public interest among all classes of the community. The Assembly generally sits about ten days. When its business is finished, the moderator usually addresses himself to his grace the commissioner, in a speech, embracing the affairs that have been discussed,

and the topics of prominent interest of the day, and the subjects of religious joy or despondency of the times. He then nominally dissolves the Assembly, in the name of the Lord Jesus, the King and Head of his church. At this name the members all make an obeisance. He then names a certain day, in the month of May in the following year, for the next assembly to meet. After all these formalities are concluded, his grace the lord commissioner rises, and in his majesty's name really dissolves the Assembly, and appoints the same day named by the moderator for the next assembly to convocate. The Assembly makes no obeisance when they are dissolved in the king's name. The moderator then prays, and the Assembly sing a psalm; after which the moderator pronounces a blessing, and they depart.

I will now notice the distribution and exercise of the judicial, legislative, and executive powers. In all spiritual societies there is a judicial power exercised in the infliction and removal of censures. On this point the Confession of Faith is very decided. "To these officers (the ministers) the keys of the kingdom of heaven are committed, by virtue whereof they have power respectively to retain and remit sins, to shut that kingdom against the impenitent, both by the word and censures; and to open it unto penitent sinners, by the ministry of the gospel and by absolution from censures, as occasion shall require."\* By the presbyterian constitution, however, this power is not intrusted to the minister of a parish in his individual capacity. It is only when he sits as moderator of his parish session, and in concurrence with his lay elders, that he can rebuke, suspend, or excommunicate. The minister's immediate superior is the presbytery. That court can, at any time, inquire in what manner he performs his official duties. It exercises a censorial inspection over his whole conduct, and complaints against him must be brought before it. Should he be deposed, its sentence deprives him of all right to the stipend, and renders his parish vacant. This is the effect of the connexion between church and state.

Each of the courts have the right of making laws obligatory within their own jurisdiction. But the General Assembly alone possesses the power of legislating for the whole establishment. This privilege is, however, not altogether supreme, as by the Barrier Act, already cited, the presbyteries possess a controlling power. The Barrier Act has the effect of preventing hasty legislation, an evil always to be deprecated. Especially as, in the space of ten days, it is hardly possible to give that mature consideration to any subject which its importance may require. "At the same time," says Dr Hill, "it must be acknowledged, that the operation of the Barrier Act tends to produce great tardiness in the legislation of

\* Conf. of Faith, cxxx. sec. 2.



the church. For some presbyteries neglect to send any opinion ; others disapprove ; others propose alterations ; so that many years sometimes elapse before the consent of forty presbyteries can be obtained to the whole complex proposition that was transmitted to them.\* As a remedy for this, the Assembly generally passes an "interim act," which temporary law is, however, binding on the whole till the meeting of the next assembly. This interim law rouses presbyteries to consider the overtures more expeditiously. Sometimes these interims, by tacit acquiescence, acquire the authority of standing laws.

All the inferior courts exercise an executive power in the ordinary discharge of their duty. In the trial of candidates for the ministry, presbyteries are the especial executive officers of the establishment. But the supreme executive power lies in the General Assembly, which, in concurrence with the state,† gave the inferior courts also an executive power. In virtue of this power, the Assembly issues peremptory mandates ; summons both individuals and inferior courts to its bar ; sends precise orders to inferior courts, directing, assisting, or restraining them in the discharge of their functions. The decisions of the Assembly are the common law of the establishment. "The existence of this authority is essential to the unity and vigour of our political system. Without it the Church of Scotland would soon lose its glory, and separate into a number of petty independent jurisdictions, scattered over the districts of the country, unequal to their own defence, and insufficient for the purposes of an ecclesiastical establishment." The settlement of vacant parishes has chiefly called for the executive powers of the Assembly. Its vigour in this particular occasioned a secession from its communion in the beginning of the last century. When a presbytery, from any cause, delays or refuses to settle a minister, complaint is made to the Assembly. If it is satisfied that the presbytery has not acted right, it peremptorily enjoins them to proceed, with all speed, to admit the presentee. Should the presbytery still demur, the Assembly appoints certain days for meeting, prescribes the whole course of procedure, and constitutes the presbytery the Assembly's ministerial officers for that particular case. The presbytery is not allowed to exercise its own judgment, but are required implicitly to obey the instructions of the Assembly.

It is impossible, however, for a court which only meets once a-year, and then only for ten days, to exercise its executive power all the year round. Therefore, before dissolution, it appoints a *commission*. This commission consists of thirty-one members, whereof twenty-one must be ministers, the remainder lay elders. They choose their own moderator. They

\* Hill's View of the Constitution.

† Act of Parliament 1592, c. 114.

have the power of an assembly in all matters referred to them from it. Strictly speaking, they can only act by recommendation of the Assembly. But that recommendation usually includes a clause, empowering them to act in anything that may be for the general good of the church. Among other things the annual instructions are, "to advert to the interest of the church on every occasion, that the church, and present establishment thereof, do not suffer or sustain any prejudice which they can prevent, as they shall be answerable." The commission is responsible to the next General Assembly, they therefore keep a register of their proceedings.

We sum up this delineation of the constitution in the words of professor Hill, to whom we have been chiefly indebted for this sketch. "The judicial power ascends through all the courts, terminating in the General Assembly: the legislative both originates and ends there, with this restriction upon the exercise of it, that without the concurrence of a majority of presbyteries, the General Assembly cannot enact any law: the supreme executive is lodged in the General Assembly, whose orders direct and control the inferior branches, until the whole body declare that they are illegal. In this distribution of power, there is a sufficient energy and vigour for the despatch of business: there is a tardiness only with regard to that which, of all things, requires the most deliberation, the enactment of permanent laws; and there is a provision made for the constitutional operation of that jealousy, natural and proper in all republics, by which the rights and liberties of the inferior branches are defended against encroachment, and the General Assembly, however respectable by the description of its members, and the various offices assigned to it, is effectually restrained from making innovations."\*

The established ministers of Scotland are individually styled *reverend*; a presbytery, the *reverend* presbytery; a synod, the *very reverend* synod; and the supreme court is styled the *venerable* Assembly. In the Assembly, his majesty is represented by a nobleman, who is styled *grace*. He is received and attended with royal honours. He takes precedence of all other noblemen for the time being. The keys of the city are always given into his custody, by the lord provost, of Edinburgh, on his knee; to whom his grace returns them, accompanied with a speech. He holds a levee, which is attended by all the nobility and gentry in Edinburgh, by all the magistrates, naval and military officers, and the members of Assembly. He is attended by a military escort, and the streets are lined with military when he proceeds in state to church and to open the Assembly. For this pageantry, his grace the commissioner is paid £3000 by the exchequer in Scotland: and I have Mr Joseph Hume, M. P. for Middlesex's letter,

\* Hill's View of the Constitution.

dated 26th February, 1830, stating that he is paid £1000 further on his return to London. It requires a further sum, of about £1000, to pay the purse-bearer, clerks, pages, and other expenses incident to the respectability and efficiency of this ancient court. Besides these expenses, his majesty is pleased to place £1000, from the privy purse, at the disposal of the Assembly, for promoting education in the highlands and islands.

### THE SECESSION.

AT the Revolution, the presbyterian religion was established in Scotland, on the basis of the "inclinations of the people." Patronage was abolished in 1649, and again revived in 1662. In 1688 it was again abolished, and continued in abeyance till the year 1712, when the act of queen Anne, already given, was passed, which restored patronage. When this bill was before parliament, the commission of Assembly declared patronage to be "contrary to the presbyterian constitution solemnly ratified by acts of parliament of both kingdoms, and calculated inevitably to obstruct the work of the gospel, and create great disorder and disquiet in this church and land." "In fact, the large share of patronage possessed by the crown in Scotland, serves for the same purpose as the supremacy which it enjoys in England does."\* Patronage and toleration were loudly complained of as being "the floodgates of error and corruption." Strong remonstrances were accordingly made both to parliament and the General Assembly. By a tacit compromise, the people and the patron united their claims for a number of years, but it gradually became common to accept of a presentation. The General Assembly also showed an inclination to support the patron. In consequence, violent settlements were made sometimes by the presbyteries, and at others, by committees appointed by the commission of Assembly.

Ever since the Revolution, it has been the fruitful parent of schism and division in Scotland. Mr Glass, minister of Tealing, contended, in 1727, not only against patronage, but also against all civil establishments. The presbytery of Dundee cited him to answer for his heterodoxy, in April, 1728. In his defence, he maintained, "that a church might be persecuted or tolerated according to the will of princes, and that all those bearing the name of christian ministers, who accepted of civil emoluments from the state, were unacquainted with the gospel, and enemies to Christ's kingdom." Were such doctrines to be established, the presbytery feared the crown might sequester their livings. The presbytery deposed Mr

\* Test. Associate Synod of Original Seceders.

Glass from the ministry. From this sentence, Mr Glass appealed to the synod. He defended his opinions in that court with great ability. The synod confirmed the sentence of the presbytery, "deposed him from the ministry, prohibited and discharged him from exercising the same, or any part thereof, in all time coming, under pain of the highest censures of the church." Mr Glass disregarded the primary deposition by the presbytery. He continued to exercise his functions as formerly; and, as might be expected from the nature of presbyterian government, from this last sentence he appealed to the General Assembly. In the interim, he was compelled to vacate his parish. Yet he continued to exercise his ministerial office, to those who adhered to him. His popularity was great. The reputation of persecution engaged the sympathies of the people in his favour. In the course of a few years, his followers increasing, he erected a chapel in Dundee. On the 12th March, 1730, the commission of the General Assembly confirmed the synod's sentence of deposition. In the Assembly of 1731, an attempt was made to restore Mr Glass. They annexed a condition, however, which no doubt influenced Mr Glass in rejecting the offer. The Assembly "did take off the sentence of deposition, passed by the commission, 12th March, 1730, against Mr John Glass, then minister at Tealing, for independent principles, and did restore him to the character and exercise of a minister of the gospel of Christ; but declared, notwithstanding, that he is not to be esteemed a minister of the established church of Scotland, or capable to be called or settled therein, until he shall renounce the principles embraced and avowed by him, that are inconsistent with the constitution of this church." This condition merely served as a salvo for the Assembly's intolerance. Mr Glass paid no attention to it, but continued his separation. He made frequent tours through the kingdom, preaching in all the principal towns. He erected meeting-houses wherever he found a competent number of persons who adopted his peculiar tenets. Dundee continued to be the principal scene of his labours. He was joined by several ministers; and as their acknowledged chief, he drew up a system for their regulation.

In 1731, an overture was transmitted to the presbyteries, in terms of the Barrier Act, "concerning the method of planting vacant churches:" a kind of supplement to the law of patronage. This act lodged the sole power of election in a meeting of protestant elders and heritors. This act made no exception of the episcopalian heritors, so that when they were most numerous in a parish, they had it in their power to present. This was naturally considered a grievance. To enforce these settlements, the Assembly had recourse to very despotic measures. That court denied dissenters the right of exercising the ordinary methods of expressing their dissent. In consequence, the only method left for complaint was from the

pulpit. When the Assembly met in May, 1732, it was found that eighteen presbyteries had made no return: twelve were in favour of the act, with some amendments; six were absolutely favourable; and thirty-one were decidedly opposed to it. At the same time, two remonstrances were presented against the overture. These the Assembly refused to receive, and, notwithstanding that the returns from the presbyteries were unfavourable, enacted the above as a *standing law*.

In this state of general dissatisfaction and excitement, the synod of Perth and Stirling met at Stirling, in October, 1732, and Mr Ebenezer Erskine, minister of that town, was appointed to preach. In his sermon, he inveighed against the defections of the times; and, in particular, animadverted severely on the late act of Assembly, and on the violent settlements of ministers. For these freedoms, the synod adjudged him to be rebuked, from which sentence Mr Erskine protested and appealed to the General Assembly. Twelve of the ministers of this synod adhered to Mr Erskine's protest. The Assembly which met in 1733 approved of the sentence of the synod, and ordered the rebuke and admonition to be pronounced. Against this Mr Erskine again protested, asserting his liberty to preach the same truths, and to testify against the same or the like defections, upon all proper occasions. Three of his brethren, Messrs Moncrief, minister of Abernethy, Wilson of Perth, and Fisher of Kinclaven, united with him in his refusal of submitting to be rebuked, as an undue restraint on ministerial freedom. These presented a protest to the Assembly, but which that court refused to receive. The brethren then laid it on the table, and retired, where it lay unobserved for some time. A minister accidentally took up the paper, read it, and called the attention of the court to its contents. It was declared to be an insult to the court, and the offenders were cited to appear at the bar the following day. On their attendance at the bar, a committee was appointed to communicate with them. The committee reported: *that the four brethren continued fully resolved to adhere to their paper and protest*. When placed at the bar, the Assembly passed the following sentence, without permitting the brethren to speak:

“The General Assembly ordains, that the four brethren, aforesaid, appear before the commission in August next, and there show their sorrow for their conduct and misbehaviour in offering to protest, and in giving in to this Assembly the paper by them subscribed; and that they then retract the same. And in case they do not appear before the said commission in August, and there show their sorrow, and retract, as said is: the commission is hereby empowered and appointed to suspend the said brethren, or such of them as shall not obey, from the exercise of their ministry. And further, in case the said brethren shall be suspended by

the said commission, and that they shall act contrary to the said sentence of suspension, the commission is hereby empowered and appointed, at their meeting in November, or any subsequent meeting, to proceed to a higher censure against the said four brethren, or such of them as shall continue to offend by transgressing this act. And the General Assembly do appoint the several presbyteries of which the said brethren are members, to report to the commission in August, and subsequent meetings of it, their conduct and behaviour with respect to this act."

Against this sentence, the four brethren requested leave to read the following complaint and declaration, but which the Assembly peremptorily refusing, they laid it on the table, and left the bar.

"In regard the venerable Assembly have come to a positive sentence, without hearing our defences; and have appointed the commission to execute their sentence in August, in case we do not retract what we have done: we cannot but complain of this uncommon procedure; and declare that we are not at liberty to take this affair to an *avisandum*."\*

No change having taken place in the resolution of the four brethren, the commission suspended them in August. Representations from several presbyteries, kirk sessions, and town councils, were offered to the commission, praying them to delay sentence. The commission would not suffer any of these representations to be read. The moderator read the sentence, not in the name and by the authority of Jesus Christ, but in that of the Assembly: that the commission *did suspend the four protesting brethren from the exercise of the ministerial function, and all the parts thereof*. Against this sentence, the brethren protested by a written document, as follows:—"We hereby adhere to the protestations taken by us before this court, for ourselves; and in name of all the ministers, elders, and members of the Church of Scotland, and of all and every one of our respective congregations, adhering to us: Bearing that this sentence is in itself *null and void*; and that it shall be lawful and warrantable for us to exercise our ministry as hitherto we have done, and as if no such censure had been inflicted: and that if, in consequence of this sentence, any minister or probationer shall exercise any part of our *pastoral work*, the same shall be held and reputed as a violent intrusion upon our ministerial labours."

When the commission met again, in November, 1773, the four brethren appeared at the bar, and protested that they still adhered to their former declarations. A committee appointed to interrogate them reported, that the brethren "had exercised all the parts of their ministerial office, as if they had been under no such censure," and that "they had declared their resolution to continue of the same mind as formerly." At this period

\* Under consideration.

the four brethren were joined by Mr Ralph Erskine. The commission determined to proceed to the higher censure. This was only carried by the casting vote of Mr Gowdie, the moderator. Many synods, presbyteries, kirk sessions, and magistrates, petitioned for delay, at least till the following March, as authorized by the Assembly, but without effect. The commission pronounced the following sentence: that they “did and hereby do loose the relation of Mr Ebenezer Erskine, minister at Stirling, Mr William Wilson, of Perth, Mr Alexander Moncrief, of Abernethy, and Mr James Fisher, at Kinclaven, to their respective charges; and do declare them no longer ministers of this church: and do hereby prohibit all ministers of this church to employ them, or any of them, in any ministerial function. And the commission *do declare their churches vacant* from and after this sentence.”

“As the judicatories,” says Willison, “at this time seemed to act with much heat and severity, in order to support and screw up their authority; so we must own, that the four brethren seemed to show no little humour and stiffness in opposing their authority and despising their sentences: for they would give no ear to their friends, who dealt with them to show some subjection to the judicatories, as to their fathers and superiors; and although they were just now abusing their church power, and unwarrantably provoking their children, yet some regard is to be shown to their authority, even when so doing, as we do to our natural parents, though correcting us in an arbitrary way. As to Mr Erskine, though he was contending for the truth, many of his friends wished that he had not used such asperity and tartness of expression about the ministers and judicatories of the church as he did; and many of the leading men in the judicatories said, this was the only thing they quarrelled in his sermon; but Mr Erskine would make no acknowledgment or submission of any sort, though even Mr Wilson and Mr Moncrief said, in their reasons of dissent, that *they did not pretend to justify his modes of expression* in that sermon. We do not see that it would have been any loss to the truth the four brethren appeared for, that they had all showed more respect to the supreme authority of the church in their conduct than they did; particularly, though they had forbore to protest, as they did in express words, against the sentence of the Assembly as *UNJUST*, and against any censure they should inflict on them as *null and void* in itself: and if, upon their being suspended, any minister or probationer should preach in their parishes, the same should be held as an intrusion upon their charges. And as they protested, so they submitted not to the sentence for one day.”\*

On the sentence being pronounced, the associated brethren, who were

\* Willison's Testimony, pp. 78, 79.

now by new adhesions increased to seven, protested that, notwithstanding this sentence, their pastoral relation should be held and reputed firm and valid: and “that, notwithstanding our being cast out from ministerial communion with the established church of Scotland, we still hold communion with all and every one who desire, with us, to adhere to the principles of the true presbyterian covenanted Church of Scotland, in her doctrine, worship, government, and discipline: and particularly with every one who are groaning under the evils, and who are affected with the grievances we have been complaining of; who are, in their several spheres, wrestling against the same. But in regard that the *prevailing party* in this established church, who have now cast us out from ministerial communion with them, are now carrying on a course of defection from our reformed and covenanted principles; and, particularly, are suppressing ministerial freedom and faithfulness, in testifying against the present backslidings of the church, and inflicting censures on ministers for witnessing, by protestations and otherwise, against the same: *Therefore* we do, for these and many other weighty reasons, to be laid open in due time, protest that we are obliged to *make a SECESSION from them*; and that we can have no ministerial communion with them, till they see their sins and mistakes, and amend them. And in like manner we do protest, that it shall be lawful and warrantable for us to exercise the keys of doctrine, discipline, and government, according to the Word of God, and Confession of Faith, and the principles and constitutions of the covenanted Church of Scotland; as if no such censure had been passed upon us: upon all which we take instruments.\* And we hereby appeal unto the first free, faithful, and reforming General Assembly of the Church of Scotland.” Signed by the four brethren.

The conduct of the commission of Assembly seems to have been sufficiently arbitrary. The whole establishment appeared at this time to sympathise with the four brethren. The presbyteries generally sent up representatives to the Assembly of 1734, sufficiently willing to censure the party and despotic proceedings of their commission, and to restore the four brethren to their charges; but this was rendered impossible. On the 6th of December, 1733, the seven associated brethren met at a place called Gairney-bridge, near Kinross, and constituted themselves into a separate presbytery. They spent the preceding day in fasting and prayer. They assumed the name of the ASSOCIATE PRESBYTERY. Among other reasons, they assigned the following for this important step:—“That they might be in a condition and capacity to exercise all the parts of their pas-

\* *Instrument* is a technical term, signifying the payment of a fee (say one shilling) to the clerk of Assembly, for receiving a process and recording it, or any paper, protest, or dissent, with which it is accompanied.



toral office ; that they might have a more special claim to the promise of the divine presence among them ; that they might maintain proper order among themselves, distinguishing themselves from those of the *sectarian* and *independent* way ; that they might be in a better capacity for affording help and relief to the oppressed heritage of God through the land ; and that they might endeavour to lift up a *judicial* as well as a *doctrinal* testimony for Scotland's covenanted Reformation ; and against the present declinings and backslidings from the same." In March, 1734, the associated brethren published a testimony, with a review of a narrative of the proceedings against them, published by the commission of Assembly. In reviewing this document, they say : " Our ordination vows and engagements oblige us to the several steps we have taken. We are indeed bound at our ordination, to subject ourselves unto the judicatories of the church ; but it is not an *absolute subjection* that we engage unto ; it is not a *blind* and *implicit obedience* that we bind ourselves unto, but a subjection *in the Lord* ; a subjection *qualified* and *limited* by the word of God, and the received and known principles of this church. The obligation of our ordination vows, to maintain communion with the established church, is subordinate to their obligation, by these vows, for maintaining the Reformation principles ; so that the same vows, which did formerly bind us to *communion* with the established church, do now bind us to *secession* from her. Our submission to judicatories is according to the Word of God ; and our received and approved standards of doctrine, worship, government, and discipline : these are the only terms of ministerial communion amongst us ; and we refuse that we have broken through any of them. We have continued in ministerial communion with what is reckoned the established church, till the prevailing party have declared that they will not allow us any longer ministerial communion with them. The prevailing party have now declared, that they will allow none to continue in ministerial communion with them, who shall testify, either doctrinally from the pulpit, or by protestation in the supreme judicatory, against their sinful and unwarrantable proceedings. We have made a secession from the prevailing party, who are carrying on the course of defection. Our secession is not from the Church of Scotland : we own her doctrine, contained in her Confession of Faith ; we observe the received and approved uniformity of worship ; we adhere unto her presbyterian government and discipline, according unto the word of God, and our solemn covenant engagements ; and we have not been convicted of anything in doctrine or practice to the contrary."

The establishment now became alarmed at the effects of the General Assembly's arbitrary proceedings. The schism was evidently widening, and presented a very threatening aspect. The presbyteries therefore sent

up, says Willison, "pious and experienced ministers, with sincere intentions, to have matters settled upon a better footing if possible. Now it would have extremely strengthened their hands, in their good designs to redress grievances and advance reformation, if the four brethren had tabled (laid) their complaint before them, and represented what they would have the Assembly to do to satisfy them; but this they declined to do, though they were all in the town at the time."\* The Assembly of 1734 repealed several obnoxious acts of Assembly, "because they were found hurtful to this church." They reversed the settlement of a minister who had been forcibly placed at Auchtermuchty by the commission. They declared the sentences of the commission to be reversible. They reviewed and contracted the powers of that court of delegates, and prohibited it from forcibly settling a presentee, where the local synod or presbytery opposed it. They empowered the commission to address the king and parliament for relief from patronage. They empowered the synod of Perth and Stirling to restore the four ejected brethren to their charges, and the communion of the church. And they enacted, "that due and regular ministerial freedom is still left entire to all ministers." In July of the same year, the synod "did take off the sentences pronounced by the commission of the General Assembly of 1733, against the foresaid four brethren, declaring the same of no force or effect for the future:" and so "did unite and restore them to ministerial communion with this church, to their several charges, and to the exercise of all parts of the ministerial function therein."

A door was now opened for the seceders to have returned to communion with their established brethren. They debated the subject accordingly. The result was, "that though they owned some parts of grounds of their secession to be removed, by the repeal of the foresaid acts, 1730 and 1732, yet they found the *principal ground* of it remaining, unremoved, yea rather aggravated by the Assembly, 1734. So that they could not accede to the judicatories in a consistency with, or without falling from, the testimony they had given."† In their "Reasons of Non-accession," published in May, 1735, they say: "When matters were come to such a pass that we were excluded from keeping up a proper testimony against the defections and backslidings of the prevailing party, in a way of ministerial communion with them; we judged it our necessary duty, for this and other reasons, to make a *secession from the judicatories of the established church*: and since the Lord, in his adorable providence, permitted the judicatories to thrust us out at a time when a course of defection was carried on with a high hand; it will therefore be necessary, for the vindication of our present conduct, to inquire if the Assembly, 1734, have at

\* Willison's Testimony, &c., p. 81.

† Reasons of Non-accession.

least so far removed the grounds of our secession, that we may, in a consistency with the testimony we have emitted, *accede* unto the judicatories of the church, and join in ministerial communion with them."

At same time with their reasons for non-accession, the seceders made some proposals for the removal of some of those difficulties which stood in the way of their reunion. Not, however, as being all that they wanted, but "if they were done, we might have the comfortable prospect of a pleasant and desirable unity and harmony with our brethren; in concurring with them, according to our weak measure, in all other necessary steps towards a further reformation." The substance of their proposals was as follows:—"That there should be a seasonable warning against the infidelity and gross errors prevailing; a proper assertion of the truth, in opposition to Mr Simson's Arian heresy; and express condemnation of his other gross and dangerous errors; an inflicting of the highest censure of the church upon William Nimmo, for the bold and daring attack upon the whole of divine revelation, if found proven against him; and an inflicting of the same censure on Mr Campbell, and Mr Wallace, one of the ministers of Edinburgh, for gross and pernicious errors vented by them, upon these errors being found proven against them; that the act of Assembly, 1733, concerning Mr Erskine and his three brethren, should be declared rescinded;—and all that had followed thereupon declared null and void in itself; and the ministers enjoined to give faithful warning against the prevailing corruptions of the times: that the act of Assembly, 1733, concerning some brethren in the presbytery of Dunfermline, should be also rescinded; and ministers declared at freedom to dispense sealing ordinances to such as could not submit to the ministry of intruders; that the acceptance of presentations should be declared contrary to the principles of this church; probationers accepting of them to be deprived of their license; ministers, for such a transgression, to be suspended, and, if tenaciously adhering, deposed; and an act passed against any settlement, in time coming, without the call and consent of the majority of the congregation, who are admitted to full communion with the church in all her sealing ordinances: that all presbyteries should be strictly enjoined to use due caution and tenderness in the licensing of young men; and an act be passed against the dangerous innovation both in the method and strain of preaching; and that, in the grounds of a national fast, there should be an acknowledgment of the great guilt of this land; and in having gone on into such a course of backsliding, contrary to the word of God, and to the obligations those lands are under to promote reformation, by our covenants, national and solemn league; with a full and particular enumeration of the steps of defection made in our day."\*

\* Reasons of Non-accession, p. 50.

The seceders thought, at the end of two years, that they had still grounds of complaint. Forcible settlements still continued. Mr Campbell was dismissed from the bar of Assembly without censure, although his published opinions were erroneous. They therefore resolved to act in a judicial capacity. They determined to administer divine ordinances to such as should apply for them. They agreed to settle their terms of fellowship, and assert the genuine principles and attainments of the Church of Scotland. For which purpose, in 1736, they published a judicial testimony; likewise an enlargement of their former testimony on the doctrine of grace, in which they explained and vindicated the difference between the law and the gospel, and the motives and grounds of evangelical obedience. This was in opposition to the acts of the General Assembly respecting the Marrow of Modern Divinity, and the legal strain of preaching that had become common. They also renewed and swore to the solemn league and covenant. They, at same time, emitted a declaration of their principles respecting the civil government. Many of those who recognised the covenant as a fundamental principle, had not only refused to communicate with the establishment, but to acknowledge the civil government, or to obey the magistrates. These people continued some time without ministers. They were at last joined by Mr Macmillan, a minister of the establishment. The associate presbytery accordingly condemned their principles. Mr Nairn, one of the seceders, dissented from this position, and defended the principles of the covenanters, because the magistrates were deficient of those qualities required by the covenant. He asserted that none but a covenanted presbyterian could be the lawful sovereign of this realm. He accordingly separated from the seceders; and, joining Mr Macmillan, these two constituted the REFORMED PRESBYTERY.

The seceding brethren were much displeased at the transactions of the General Assembly, respecting some professors who had taught and published doctrines inconsistent with the Confession of Faith. "They took occasion," says Willison, "to carry their secession and separation to very great heights by licensing preachers, invading parishes, and preaching up separation everywhere, not sparing their best friends, nor those who dissented from the evils of the time, but charging the whole ministry with very black things." For these causes, and also the testimony so often cited, the Assembly cited the seceding brethren to appear at their bar, in 1739. Accordingly, the whole eight brethren appeared in the capacity of a constituted court, headed by their moderator. But instead of answering to their indictment, the associate synod, by the ministry of their moderator, read an act of their own court. This act condemned the courts of the establishment, as not being lawful courts of Christ. Their moderator then, in the name of the secession presbytery, declined the authority

and jurisdiction of the General Assembly. They then withdrew from the bar, and the breach became irreconcilable. The Assembly then enacted, "that for their declinature, contempt, and schismatical courses, &c., they deserve deposition." But to give them time for reflection, and to return to their duty, they forbore for one year; and accordingly cited them to the bar of the Assembly of 1740. This citation the brethren held in due contempt. The Assembly of 1740 therefore deposed the whole eight brethren, in these words: *They depose them from the office of the holy ministry, prohibiting them to exercise the same within this church.\**

The secession from the establishment had now become so considerable, that, before the year 1745, so many presbyteries had been constituted, in different parts of the country, that they were enabled to form a supreme court, or synod. The secession was now called the ASSOCIATE SYNOD. But with their success, "the leaven of prejudice and suspicion insinuated itself, soured their minds, and fomented any difference of sentiment which at first existed among them."† The period was now arrived when the seceders were to be divided into burghers and antiburghers. In 1745, the question of the lawfulness of burghers oaths was debated in the synod. The clause under debate was: "Here I protest, before God and your lordships, that I profess, and allow with my heart, the true religion presently (at present) professed within this realm, and authorized by the laws thereof: I shall abide thereat, and defend the same to my life's end; renouncing the Roman religion called popery." The two Erskines, Fisher, and others, contended that it was the religion itself, and not its maladministration, to which they were required to swear: that they had not set up a new religion, but clung closely to what they had previously professed: that since they had solemnly approved of the doctrine, worship, discipline, and government; since they had solemnly declared their adherence to the Westminster Confession: that by their ordination vows they had sworn to that very religion, doctrine, worship, discipline, and government, professed and established in the realm: that although they had objected to the manner in which the true religion is at present professed and settled: that though they had testified against the corruptions both in church and state: yet they had, but two years before, judicially declared the established religion to be the *true religion itself*. They had solemnly thanked God, "that *our religion* has such security by the present civil government as no nation on earth enjoys the like." Therefore "the synod could not, without the most glaring self-contradiction, prohibit the swearing of the above clause, *as in itself* sinful for a seceder." On the other hand, Messrs

\* Willison's Testimony, pp. 91, 92.

† Willison's Testimony, p. 58.

Moncrief, Mair, Gibb, and others, contended that this oath, being administered for the security of the establishment, was to be understood in the sense of the imposers. That the *true religion*, to which it referred, must mean the corruptions in its administration, from which they had seceded. That it not only contemplated the corruptions in the state religion, but in the state itself; which, by consequence, implied a departure from the whole of their testimony. In fact, it gave up the whole cause of their secession. And therefore the words "true religion, presently (at present) professed and authorized," might be applied indifferently to a true and a false religion. The synod of 1746 came to this decision: that "those of the secession cannot, with safety of conscience and without sin, swear any burgess oath with the said religious clause, while matters with reference to the profession and settlement of religion continue in such circumstances as the present." The minority on this question protested against this decision. The bitter waters of controversy were now let loose, and violently agitated the whole body. In the synod of 1747, it was proposed, that the condemnatory decision of the former synod should, neither then nor afterwards, be a term of ministerial and christian communion; and that this question be referred to presbyteries and kirk sessions. This question was considered disorderly. Members protested against it accordingly; but as the protesters did not vote, the motion was carried. Those members who supported the original decision subscribed a declaration and protest; in which they maintained, "that, as the meeting had materially dropped the whole testimony, the lawful authority and power of the associate synod is devolved on a constituted meeting of those ministers and elders who had protested against the late vote, and such as should join them." The synod was now divided into two separate and hostile bodies. Each division asserted that it was the majority; and each laid claim to the title and powers of the supreme court. The two divisions now constituted two distinct synodical courts. That which defended the burgess oath passed an act annulling their opponents' synod. Those who condemned the oath erected themselves into a synod, and excommunicated their antagonists. The two parties were denominated BURGHERS and ANTIBURGHERS. The latter were the most numerous. The former again split into two parties, in the year 1799, and were denominated the OLD LIGHT and the NEW LIGHT BURGHERS. These, however, effected an union together in the year 1819. This union was not effected with unanimity. Nine ministers protested against the Basis of Union, and formed a separate synod, under the denomination of the ASSOCIATE SYNOD.

At the period of these secessions, the General Assembly seems to have been strongly influenced by the lust of power. It had screwed up its authority to a pitch of despotism which drove many from the established

communion. Ever since the ordinance of parliament which gave the right, popular election has always been a favourite measure in Scotland. To enforce the legal presentations of patrons, the General Assembly had exercised its executive powers with considerable energy. Presentees were usually denominated "intruders." One of those violent settlements, in the year 1752, occasioned another secession from the establishment. A Mr Andrew Richardson was presented to the church and parish of Inverkeithing, in the presbytery of Dunfermline. The parishioners objected vehemently, and appealed to the General Assembly then sitting. That court ordered the presbytery peremptorily to induct Mr Richardson. Every minister within the presbytery was ordered to attend and witness the execution of their sentence. Mr Thomas Gillespie, minister of Carnock, and five other ministers, refused to obey the Assembly's mandate. They sympathised with the parishioners in their desire to elect a minister more agreeable "to the inclinations of the people" than Mr Richardson appears to have been. The Assembly summoned the whole presbytery of Dunfermline to their bar. At the bar, Mr Gillespie and his five associates acknowledged their disobedience to the Assembly's mandate. In vindication, they stated their objections to intrusions and violent settlements. They reminded the Assembly, that that court itself, in 1736, had declared: "that it is, and has been ever since the Reformation, the principles of this church, that no minister shall be intruded into any parish, contrary to the will of the congregation; and therefore it is seriously recommended to all judicatories of this church, to have a due regard to the said principles, in planting vacant congregations, so as none be intruded into such parishes, as they regard the glory of God and the edification of the body of Christ." This appeal to their own decisions only inflamed the already irritable feelings of the Assembly. They deposed Mr Gillespie from his office of the ministry, and loosed his connexion with his parishioners. Willing, as they said, to mix mercy with judgment, the Assembly only suspended the other five from the exercise of the judicial part of their office. Mr Gillespie was alone violently thrust out of his parish, and degraded from his office. The manner and indecent haste of their proceedings were very remarkable. The Assembly issued their mandate for the ordination and induction of Mr Richardson, on Monday. The day for his induction was Thursday, at eleven o'clock. On Friday, every member of the presbytery was summoned to appear at the bar of the Assembly; and, on Saturday, Mr Gillespie was deposed. These energetic measures only occupied the short space of one week. This indecent haste in so solemn an affair, gave offence to many, and occasioned the establishment of the RELIEF SYNOD. Such wanton despotism is inseparable from collective bodies of men. Professor Hill says, that the government of the

Church of Scotland is *republican*. The tyranny and injustice which were practised against Mr Gillespie is inseparable from republican governments. It cannot be otherwise. The odium of a guilty deed is divided among many. Every individual member shifts it off his own shoulders, and thinks, because others were concerned, that therefore he is less guilty. Bodies of men are incapable of mercy. They never pardon. A sentence once passed is irreversible. Therefore governments, where there is only judgment without mercy, cannot be from God. He is essentially merciful; and his representative, and individual judge or governor, has the principle of mercy within his own breast. Mr Gillespie would never have sustained such a severe and unjust sentence from an individual judge, as a republican court inflicted. That judgment, which was never reversed, occasioned a schism from their body which in a few years mightily increased. Although deprived of the temporalities, Mr Gillespie considered that his spiritual relation still continued. He accordingly preached in the open air to his late parishioners. Persecution added a sanctity to his name, and a popularity to his cause, which he had never before enjoyed. He was considered the champion of the people's rights. In a short time his followers built a chapel in Dunfermline. In the course of a few years he was joined by Mr Thomas Boston, late minister of Oxnam, in Roxburghshire. The General Assembly declared Mr Boston incapable of being again received into the establishment, or even of preaching in a parish church; and discharged all ministers under their jurisdiction from holding ministerial communion with him. These two original pillars were soon after joined by a Mr Collier, an English dissenter. These three, with some lay elders, constituted themselves a presbytery at Colinsburgh, in the county of Fife. A trifling circumstance gave rise to their name. Some inhabitants of Colinsburgh solicited them for *relief* from the burden of patronage. They therefore denominated themselves the *Presbytery of Relief*; which, when their numbers increased, was afterwards changed into the *Relief Synod*.

Independency has never flourished much in Scotland. This system was first introduced in England, about the year 1580. Robert Brown has the equivocal honour of being its founder. Hence his followers were first called Brownists. They have had various names: Brownists, Barrowists, Congregationalists; but they are now generally known by the name of Independents. They became very numerous in England. Neale says, that in their articles of faith they did not differ much from the Church of England, but were very rigid and narrow in points of discipline. They were the most tolerant in their principles of all the sects. Cromwell introduced their system into Scotland. Their number was greatly increased some years, by a Mr Haldane sending out itinerant lay preachers. These erected tabernacles in different parts of the country, which settled down



into independent congregations. They have since split into several independent denominations, at variance with the parent stock. In the time of Oliver Cromwell, a Baptist meeting was established in Edinburgh. But with that exception there are no traces of them in Scotland till the year 1765. In that year, Mr Carmichael and Mr Maclean formed a congregation, and there are now several Baptist congregations. Neale says, that the first Baptist congregation which assembled in England, was in 1640; when a few individuals, dissatisfied with the lawfulness of infant baptism, assembled in London. They chose a Mr Jesse for their minister, who founded that denomination. There are many other minor seceders and dissenters in Scotland, but we have only mentioned the most prominent.

The seceders are not dissenters from the Scottish establishment. They allege, that they maintain the doctrine, discipline, and mode of worship, in greater purity. They seceded from it, on account of the maladministration of all these; and they object especially to the system of patronage. When the maladministration is corrected, they are ready to unite with the establishment. They avow the necessity of popular election in the choice of a minister. On this point, however, there is a division among them; some contending that only heads of families, who are communicants, are privileged to vote; others, again, that all of full age, both men and women, are entitled.\*

## POOR LAWS

THE law of England recognises three descriptions of poor. 1. Poor by *impotency and defect*. These consist of the aged or decrepid, fatherless or motherless; poor under sickness, idiots, lunatics, lame, blind, &c. 2. Poor by *casualty*. Housekeepers, decayed or ruined by unavoidable misfortunes; poor persons, overcharged with children; disabled labourers. —These are to be set to work, if they be able; if they are unable to work, they are to be relieved with money.—3. Poor by *prodigality and debauchery*, commonly called *thriftless poor*. These are idle, slothful persons, pilferers, vagabonds, strumpets, &c. These are to be sent to the house of correction, and to be put to hard labour, to maintain themselves; or work is to be provided for them, that they do not perish for want. If these become impotent by sickness, or if their work will not maintain them, there must be an allowance by the overseers of the poor for their support.

The law not only regards life and member, and protects every man in

\* The Present Truth, a Display of the Secession Testimony, in the three periods of the Rise, State, and Maintenance of that Testimony.—Testimony of the Associate Synod of Original Seceders.—Willison's Testimony.—Neale's History of the Puritans.—Adams' Religious World Displayed.

the enjoyment of them ; but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply, sufficient for all the necessities of life, from the more opulent part of the community, by means of several statutes enacted for relief of the poor. Till the time of Henry VIII., the poor of England subsisted entirely by private benevolence. In Ireland, the poor have not to this day any relief for their wretchedness, but private charity alone. By ancient statutes, the poor were directed to remain in the cities and towns where they were born, or wherein they had dwelt for three years. This seems to have been the origin of parish settlements. After the dissolution of the religious houses, in the reign of Henry VIII., the idle who would not, and the indigent, infirm, and aged, who could not work, were exceedingly numerous. Before the Reformation, the monasteries were their principal resource. These frequently supported and fed a number of idle and indolent poor. This inconvenience was quickly felt throughout the kingdom. Abundance of statutes were made by Henry and his children, to provide for the poor and impotent. These poor were principally of two sorts : the sick and impotent—the idle and sturdy. The former could not, and the latter would not work. To provide for these in the metropolis, Edward VI. founded Christ's and St Thomas's hospitals, for the relief of the impotent through infancy or sickness ; and bridewell, for the punishment and employment of the vigorous and idle. These were insufficient for the poor of the whole kingdom. After many fruitless experiments, *overseers of the poor* were appointed in every parish.\* Their office and duty were chiefly these: 1. to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other being poor and *not able* to work, and them only; 2. to provide work for such as are able and cannot otherwise get employment. By virtue of this statute, the overseers are nominated annually, in Easter week, or within a month after.

After the Restoration, a different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivision of parishes, has greatly increased the number of the poor, by confining them to their respective districts ; and has given birth to the intricacy of the poor laws, by multiplying and rendering more easy the methods of gaining settlements. In consequence, innumerable and expensive lawsuits are annually entered into, between contending parishes, respecting settlements and removals. A legal settlement was declared † to be gained by birth, inhabitancy, apprenticeship, or service for forty days; within which periods, all intruders were removable from any parish, by two justices of the peace, unless they settled in a tenement of the annual value of £10,

\* 43 Eliz. c. 2.

† 13 and 14 Char. II. c. 12.

The frauds naturally following this provision, produced a subsequent statute,\* which required a *written notice*, to be given to the parish officers, before a settlement could be gained by so short a residence. Subsequent provisions allowed other notorious circumstances to be equivalent to a written notice. These circumstances have again, from time to time, been altered, enlarged, or restrained, whenever experience of new inconvenience suggested the necessity of a remedy. The system of certificates was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever. By the statute of Charles II., † all persons who are likely to become chargeable, unless they settle upon a tenement of the yearly value of £10, may be removed to the places where they are legally settled. This statute was an infringement of the liberty of the subject, as nothing can be more cruel and impolitic than to prevent a person from residing in that situation where, by his industry and occupation, he can best procure a competent provision for himself and family. To alleviate this hardship and inconvenience, another statute ‡ provided, that the major part of the churchwardens and overseers of any parish or township, shall grant a certificate, under their hands and seals, attested by two witnesses, and allowed and subscribed by two justices, acknowledging the person and his family therein specified to have a legal settlement in their parish or township, and shall direct to some particular parish or township. Such person having delivered this certificate to the parish officers where it is directed, then neither he nor his family are removable from thence till they are actually chargeable. But, as the object of the certificate was to prevent him from bringing any encumbrance upon the parish where he is thus permitted to reside, he is restrained from gaining a settlement where he lives under the protection of the certificate, by any means whatever, except by renting a tenement of the yearly value of £10, and by a residence in the parish for forty days, or by executing an annual office. But besides these two cases mentioned in the act, it has been held, that a certificate person may gain a settlement by residing upon, or having in the parish where he resides, any estate whatever of his own, provided, if it has been actually purchased by him, he has *bona fide* paid £30 for it. But the object of granting certificates is now extinguished, by an enactment,§ that no person shall be removed by an order of removal till he becomes actually chargeable. Every unmarried woman who is pregnant shall be deemed actually chargeable, and also all persons convicted of any felony, and rogues, vagabonds, and idle or disorderly persons, and persons of evil fame, or reputed thieves, not giving a satisfactory account of themselves, may be removed, as if they were

\* 1 Jam. III. c. 17. † 13 and 14, c. 12. ‡ 8 and 9 Will. III. c. 30. § 35 Geo. III. c. 101.

actually chargeable. And when a pauper is ordered to be removed by an order of removal, or by a vagrant pass in case of the sickness of the pauper, the justices making such an order may direct its execution to be suspended: and in the case of an order of removal, the expenses of the maintenance of the pauper during such suspension shall be borne by the parish to which the order of removal shall be made. And if an unmarried woman is delivered of a child during such suspension, it shall be settled in the parish which at the time of the birth was the mother's legal settlement.\*

There are several descriptions of persons who are incapable of gaining any settlement by any acts of their own. The first is that of married women, who during their marriage state cannot acquire any settlement by any act of their own. The next description is infants under seven years of age. Attainted persons are incapable of acquiring a settlement. A deserter from the army or navy cannot do any act which will entitle him to a settlement. Soldiers, while quartered in any place, cannot acquire a settlement there by hiring and service.

It remains now to show by what methods a settlement may be gained: viz. I. by birth; II. by parentage, being the settlement of either the father or mother; III. by marriage; IV. by forty days' residence and notice; V. renting for a year a tenement of the annual value of £10; VI. by being charged to and paying the public taxes and levies of the parish; VII. executing any parochial office; VIII. by hiring and service; IX. by apprenticeship; X. by estate.

It will be observed, that the first three are cases where settlements may rather be said to be communicated than gained by the parties: the rest are cases of settlements gained by the immediate act of the parties themselves. The following act is of some importance, and therefore necessary to be noticed here. The preamble recites, that divers local acts of parliament having lately passed, containing enactments relative to the maintenance and regulations of the poor, varying the general law with respect of particular districts, parishes, townships, or hamlets, and being expedient that some of such enactments should be repealed, &c., it is enacted,

I. That all enactments and provisions contained in any act or acts of parliament since the commencement of the reign of his late majesty George I., whereby any alteration is made in respect of gaining or not gaining a settlement within any particular district, parish, township, or hamlet, shall be and the same are hereby repealed; and that all and every person shall be deemed and taken to have acquired and to acquire a settlement in every such district, parish, township, or hamlet, by any ways and means he, she, or they would or might do, in case such act or acts, or any of them, had not been made and passed; and notwithstanding the same or any of them are or was in force and operation.

II. No person shall be deemed or taken to acquire any settlement in any district, parish,

\* Professor Christian's Notes on Blackstone.

&c., by reason of such person being born of the body of any mother actually confined as a prisoner within the walls of any prison, or any house licensed for the reception of pregnant women, in pursuance of an act made and passed in the 13th year of his present majesty's reign, for the better regulation of lying-in hospitals and other places appropriated for the charitable reception of pregnant women, in which any such prison or house shall be situated.

III. That whosoever any person shall be born of the body of any poor person, in any house of industry or house for the reception and care of the poor of any district, &c., which shall be locally situated in such parish, &c., not contributing to such expense, such person shall, so far as regards the settlement of such person, be deemed and taken to be born in the district, &c., by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house.

IV. No person shall be deemed or taken to gain any settlement by reason of any residence within any parish, &c., while he, she, or they shall be detained or confined as a prisoner within any such parish, &c., on any civil process, or for any contempt whatsoever.

V. No gatekeeper or tollkeeper of any turnpike road or navigation, or person renting the tolls, and residing in any tollhouse of any turnpike road or navigation, shall thereby gain any settlement in any parish, &c.

VI. No person or persons shall gain any settlement in any parish, &c., by reason of any residence in any house or other dwelling place provided for the residence of such person or persons, by any charitable institution, while such person or persons shall be supported and maintained at the expense of such charitable institution, as an object or objects of such charity.\*

By another statute it is enacted, that every house and building which shall be purchased or hired under its authority, shall in all questions relative to the settlement of persons born or lodged therein, be deemed and taken to be part of the parish on behalf of which the same shall be purchased or hired, and by which the same shall be used as a poorhouse or workhouse.†

**SETTLEMENT BY BIRTH.**—"By 13 Geo. II. c. 29, for confirming and enlarging the powers given by charter to the governors and guardians of the hospital for the maintenance and education of exposed and deserted young children, it is provided, that no child, nurse, or servant, received or employed in such hospital, shall, by virtue thereof, gain any settlement in the parish where such hospital shall be situated, and consequently, the settlement of foundlings is not different from that of all other persons; that is, if they are legitimate children they shall follow their father's settlement, if known; if not, then their mother's settlement. If neither of these is known, or if they are bastards, they shall be settled where they were born; if that cannot be known which is properly the case of a foundling, this seems to fall under the *general rule*, that every person shall be maintained and provided for in the place where he happens to be, until a settlement can be found; for, in a Christian civilized country, no person ought to be suffered to perish merely for want of necessaries." Only in the present case, the act takes such children of the parish, and leaves them to the provision of the hospital. A bastard child is *prima facie* settled where born; because a bastard must from necessity gain a settlement in its place of birth, for having no father in the eye of the law it cannot be

\* 51 Geo. III. c. 170.

† 59 Geo. III. c. 12.

otherwise provided for, except a reputed father can be found. But to this general rule there are several exceptions. If a woman come into a place by privity and collusion of the officers where she belongs, and there is delivered of a bastard, it gains no settlement, notwithstanding its birth. If a bastard is born under an order of removal, and before the mother can be sent to her place of settlement, the child gains no settlement where so born, but at the mother's settlement. A child born in the house of correction or of industry takes its mother's settlement.

Legitimate children's birth does not entitle them to a settlement, except where that of their father and mother is unknown, and then only till it is known. Formerly it was held, that a child shall continue with its parents as a nurse child, until it shall be eight years of age, during which time it shall not be deemed capable of gaining a settlement in its own right; but by the later resolutions it seems to be agreed, that a legitimate child shall necessarily follow its parent's settlement as a nurse child, or as part of the family, only until it shall be seven years of age; and that after that age it shall not be removed as part of the father's family, but with an adjudication of the place of its own last legal settlement, as being deemed capable at that age of having gained a settlement for itself. The precise time when any one may have acquired a settlement in his own right, is at the age of seven years and forty days; for a child of seven years of age may be bound apprentice to a shipwright, fisherman, owner of a ship, or other person using the trade of the seas;\* and by the vagrant act † a vagrant's child of that age may by the justices be put out an apprentice; and as soon as he shall have resided and lodged in a parish for forty days under the indenture, he will have thereby gained a settlement.

BY APPRENTICESHIP.—By the statute‡ “If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published.” Being bound an apprentice gives the servant and apprentice a settlement without notice, in that place where they serve the last forty days. This is meant to encourage industry and application to trades and reputable service.

BY SERVICE.—By a clause in the act § it is enacted, that “If any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein, though no such notice in writing be delivered and published.” And further, “Whereas some doubts having arisen touching the settlement of unmarried persons not having child or children, lawfully hired into any parish or town for one year, it is enacted

\* 5 Eliz. c. 5, s. 12.

† 17 Geo. II.

‡ 3 W. and M. c. 8.

§ 3 W. and M.

and declared, that no such person so hired as aforesaid, shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year."\* Being hired for a year when unmarried and childless, and serving a year in the same service, gains a settlement. But soldiers, seamen, or any artificer employed in the king's service, are expressly prevented from a settlement till after they have been discharged from the king's service. The settlement of a servant and apprentice is where they last reside forty days in their master's employment; and where they do not reside forty days successively at one place, but alternately in two or more parishes, and more than forty days upon the whole in each in the course of a year, the settlement is in that parish in which they sleep the last night.

BY MARRIAGE.—The wife takes her husband's settlement. But it has hitherto been rather doubtful, what shall be deemed a sufficient marriage, so as that a woman shall gain a settlement thereby; and the courts having always been favourable in admitting marriages, although not strictly solemnized according to the laws of the church; now, however, a great distinction is made between marriages solemnized before the 25th of March, 1754, and after that time, for, by the said statute, it is enacted† that after 25th March, 1754, all marriages (except in Scotland, and except the marriages of Jews and Quakers, where both the parties are Jews or Quakers respectively) which shall be solemnized without license or publication of banns, or in any other place than a church or public chapel, (unless by special license from the archbishop of Canterbury,) or without the consent of parents or guardians, (where either of the parties, not being a widower or widow, is under the age of twenty-one,) shall be null and void to all intents and purposes whatsoever. It is a good general rule, that a woman marrying a husband who has a known settlement, shall follow the husband's; and it appears to be agreed, that a wife cannot gain a separate and distinct settlement from her husband, during their marriage; neither does a woman, marrying a husband who has no known settlement, lose her former settlement which she possessed before her marriage. A woman, marrying a foreigner who dies, must be sent to the place of her own settlement before marriage. A woman, marrying a man who is settled in another parish, changes her own settlement, the law not permitting the separation of man and wife. But if the man has no settlement, hers is suspended during his life, if he remains in England, and is able to maintain her; but in his absence, or after his death, or during his inability, the wife and her children may be removed to her maiden settlement, but it seems

\* 8 and 9 W. and M. c. 30.

† 26 Geo. II. c. 53.

fully determined that they cannot be separated or removed from the husband.

**BY NOTICE.**—For a stranger to gain a settlement in a parish, he is required to give a written notice to a churchwarden, which notice must be publicly read in the church next Sunday after. If after this publication he is allowed to reside forty days within the parish, he then acquires a legal right of settlement. It is the overseer's business to prevent this, by ejecting him, if necessary, before he resides the proper time. After all, this kind of settlement, by continuing forty days, after publication of a written notice, is very seldom obtained, and the design of the acts \* is not so much for the *gaining* of settlements as for *preventing* them, by persons coming clandestinely into a parish; for the giving and publishing a notice makes ejectment compulsory on the parish. But if a person's situation is such, that it is doubtful whether he is actually removable or not, he shall, by giving notice, compel the parish either to allow him an uncontested settlement, by suffering him to remain forty days, or by removing him to try the right. But it is now enacted,† that no person in future shall gain a settlement by such notice.

**BY PARISH RATES.**—“If any person who shall come to inhabit in any town or parish shall be charged with, and pay his share towards, the public taxes or levies of the said town or parish, he shall be adjudged to have a legal settlement in the same, though no notice in writing has been delivered and published.”‡ But by a subsequent statute,§ “no person after the 22d June, 1795, who shall come into any parish, township, or place, shall gain any settlement therein, by being charged with, or paying, his share towards the public taxes or levies of such places, for and on account of, or in respect of any tenement not being of the yearly value of £10.” The tenement must consist of a house, or building, or land, within the parish, or both *bona fide* hired by him at £10 for the term of one whole year. The rent must be paid by the person hiring, and the whole of the land, as well as the house, must be situate within the same parish or township; and unless the whole of the rent has been actually paid, the tenant does not gain a settlement.

**BY SERVING A PARISH OFFICE.** “But if any person shall come to inhabit in any town or parish, shall for himself and on his own account execute any public annual office or charge in the said town or parish during one whole year, he shall be adjudged to have a legal settlement in the same, though no such notice in writing be delivered and published.”|| Executing by legal appointment any parochial office, for a whole year in the

\* 3 W. and M. c. 11, s. 5.    † 35 Geo. III. c. 101.    ‡ 3 W. and M. c. 11, s. 6.  
§ 35 Geo. III. c. 101.    || 3 W. c. 11 s. 6.



parish, as churchwarden, &c., is equivalent to notice, and gains a settlement, if coupled with forty days' residence.

BY RENTING L.10 PER YEAR.—“On complaint within forty days, after any person shall come to settle in any tenement under ten pounds a-year, two justices may remove him to where he was last legally settled for forty days.”\* “No person who shall come into any parish by certificate, shall be adjudged by any act whatsoever, to have gained a legal settlement in such parish, unless he shall really and *bona fide* take a lease of a tenement of the yearly value of ten pounds, or shall execute an annual office in such parish.” Renting a tenement of the annual rent of *ten pounds*, and residing forty days in the parish, gains a settlement without notice, upon the principle of having sufficient substance to gain credit for such a house. And it is not necessary that the renting should be for a year; if the annual value of ten pounds be taken for two months or forty days only, it is sufficient to gain a settlement. Neither is it necessary that there should be a house on the premises, the renting of after-grass or pasturage will be sufficient. On the 2d July, 1819, the following act passed both houses, to amend the laws respecting the settlement of the poor so far as regards renting tenements: “Whereas many disputes and controversies have arisen respecting the settling of poor people in parishes in England by the renting of tenements, be it enacted, &c., that from and after the passing of this act, no person shall acquire a settlement in any parish or township maintaining its own poor in England, by or by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building, or of land, within such parish or township, or of both *bona fide* hired by such person, at and for the sum of ten pounds a-year at the least, for the term of one whole year; nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring them; nor unless the whole of such land shall be situate within the same parish or township as the house wherein the person hiring such land shall dwell and inhabit.”†

BY ESTATE.—If a person possesses a freehold, and residing on it forty days, although under ten pounds a-year, he cannot be removed from it. And the courts have decided, that where a person has an estate for life, or an estate of inheritance of his own, and residing therein forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, &c., it is a sufficient settlement; but if a man acquire it by his own act, as by purchase, then, unless the consideration advanced be *bona fide* thirty pounds, it is no settlement for any

\* 13 and 14 Char. II. c. 12.

† 59 Geo. III. c. 50.

longer time than the person shall inhabit it. He cannot be removed from his own property, but he cannot acquire a permanent and lasting settlement by any trifling or fraudulent purchase.

**REMOVALS.**—The law is equally explicit regarding removals as it is on the right of settlements, but the ingenuity of lawyers and the blunders of ignorant overseers have raised an infinite number of difficulties, and occasioned an enormous waste of parish funds, which have given plentiful occupation to the judges and juries of the court of King's Bench. The statute of Charles II., which has been so repeatedly quoted, is the foundation on which all orders of removal are or ought to be established. It is as follows: "Whereas, by reason of some defects in the law, poor people are not restrained from going from one parish to another, and therefore endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most for them to burn and destroy, and when they have consumed it, then remove to another parish, and at last become rogues and vagabonds; it is enacted, that it shall be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish, to any justice of the peace, within forty days after any such person coming so to settle in any tenement under the yearly value of ten pounds, for any two justices of the peace, of the division where any person that is likely to become chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish where he was last legally settled, unless he give sufficient security for the discharge of the said parish, to be allowed by the said justices."\* "And if such person shall refuse to go, or shall not remain in such parish where he ought to be settled, but shall return of his own accord to the parish from whence he was removed, one justice may send him to the house of correction, there to be punished as a vagabond."† There is, however, a power of appealing against an order of removal: "All persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace of the said county at their next quarter sessions, who shall do them justice according to the merits of their cause."‡ And "the appeal against any order of removal of any person, shall be had, prosecuted, and determined, at the general or quarter sessions of the peace for the county, division, or riding, wherein the parish, township, or place, from which such poor person shall be removed, doth lie, and not elsewhere."§

All persons not settled as above may be removed to their own parishes, by two justices of the peace, on the overseer's complaint, if they shall judge them likely to become chargeable to the parish into which they have intruded, unless they are in a way of gaining a legal settlement, as by annual

\* 13, 14 Char. II. c. 12.    † 17 Geo. II.    ‡ 13, 14 Char. II.    § 8 and 9 W. and M.

rent of ten pounds, or by service, because in either of these cases they are not removable. And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be *their own* parishioners, they cannot be removed merely because they are likely to become chargeable, but only when they become *actually* chargeable. But such certificated persons cannot gain a settlement by any of the foregoing means, unless by renting a tenement of ten pounds per annum, or by serving an annual office in the parish; neither can an apprentice or servant to such certificated person gain a settlement by serving them.\*

OF THE POOR'S RATE.—“The churchwardens and overseers of the poor of every parish, or the greater part of them, shall raise weekly, or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of land, houses, tithes impropriate, proprietary of tithes, coal mines, or saleable underwoods in the said parish,) a convenient stock of flax, hemp, wool, thread, iron, and other ware, and stuff to set the poor on work, and also competent sums for the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, as are not able to work, and also for putting out poor children apprentices.”† “The churchwardens and overseers shall cause public notice to be given, in the church, of every rate for the relief of the poor allowed by the justices, the next Sunday after such allowance; and no rate shall be reputed sufficient to be collected, till after such notice given.”‡ Some parishes are rated on valuations taken in the reign of Charles I., when the value of property was very different from what it is at present, and therefore a rate of five, ten, or twelve shillings in the pound, for the maintenance of the poor, is not really so great as it appears, as the rate is calculated on the valued rent, and not on the actual value at present. The rate, however, when once made and duly published, may be levied by distress, against which the law allows an appeal. And it is reasonable that the party should be heard in his own defence before the justices, and not be left to the private resentment of the parish officers, who may sell a man's goods without sufficient cause. The oath of refusal must be made before the justices, showing cause why a distress should not be granted, such as that the rate was not regularly allowed, or was not published in the church, or that notice of appeal had not been given, or that neither demand nor refusal had been made, and such like. When a worthless husband deserts his wife or family, they are immediately provided for by the parish, and a reward advertised for the apprehension of the fugitive, whose goods and chattels are forfeited to the parish; and if the family thus deserted have any legal claims, the

\* Burn's Justice, Art. Poor.—Blackstone's Commentary.—Professor Christian's Notes.

† 43 Eliz.

‡ 17 Geo. II. c. 3.

parish, by prosecuting the party, may be relieved from the burden of maintaining them, and the overseers are made accountable to the justices at the quarter sessions for all such money as they shall in this way receive.”\*

The law declares parents and children mutually liable for support. The father and grandfather, mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other persons not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate, as by the justices of that county, where such sufficient persons dwell in their sessions, shall be assessed on pain of twenty shillings a-month; which penalty shall go to the poor of the same parish, and be levied by some or one of the churchwardens or overseers, by warrant from two justices, by distress; or in defect thereof, any two such justices may commit the offender to the common jail, there to remain, without bail or mainprize, till the said forfeiture shall be paid.”†

Every individual who has a settlement enjoys it in his own independent right,—it is his estate, his birthright,—and he can apply for relief in his extremity to the parish, which has no option. It is bound to relieve his wants. He demands a right, he does not beg a charity; and, certain of never being reduced to absolute want, an Englishman is always the most independent, open, generous, and sincere character. When the horrors of poverty, the desertion of wives, and the cruelties of brutal husbands and unfeeling parents, are considered, how amiable and compassionate does the law of England appear, which provides a refuge and maintenance for the wretched and houseless poor! We have divine authority that “the poor shall never cease out of the land.” Paupers are not suffered to remain for years unprovided for by the parish; the law compels the overseers of the parish, if the pauper is not admitted into the workhouse, to pay the weekly aliment in advance. The overseers may erect cottages on wastes or commons for the residence of the impotent poor, by an agreement with the lord of the manor. They may contract with any one for the keeping, maintaining, and employing the poor; and if any pauper shall refuse to work, he shall be put out of the parish books, and declared not to be entitled to relief.‡

The report, however, of the select committee of the house of commons, in 1817, gives the following alarming prediction of the effects of the system of parochial relief to that order of society by whom the rates are contributed: “Your committee feel it their imperious duty to state to the house their opinion, that unless some efficacious check be interposed there is every reason to think that the amount of the assessment will continue,

\* 5 Geo. II. c. 8.

† 43 Eliz. c. 2.

‡ 9 Geo. II. c. 2.

as it has done, to increase till, at a period more or less remote, according to the progress the evil has already made in different places, it shall have absorbed the profits of the property on which the rate may have been assessed, producing thereby the neglect and ruin of the land, and the waste or removal of other property, to the utter subversion of that happy order of society so long upheld in these kingdoms."

In Scotland, the poor laws and their administration stand on a different footing from that which they have obtained in England. In Scotland, the poor laws are not carried into effect by churchwardens and overseers; but by every person of landed property, or of certain professional influence in the country, on whom the law calls to take his individual share in maintaining the system, and in carrying it into successful operation. All the clergy and elders of the different parishes, every landowner throughout the kingdom, however small the size or value of his property may be; and the magistrates of cities, acting in the capacity of country landowners, are the persons to whom the administration of the funds are intrusted, and to whom it is left in every parish and town to determine whether there shall be an assessment or not, and its amount.

The act of 1579\* is the foundation of the Scottish poor laws, and then first introduced the measure of a compulsory assessment for assisting the impotent poor, and at the same time provided for the suppression of vagrancy. As far back as 1424, acts had been passed for the relief of the poor, which consisted simply of permission to beg, and furnishing them with *badges* for that purpose, while sturdy beggars and disorderly persons were peremptorily prohibited from begging. A subsequent statute limited the begging badges to "cruikit folke, seik folke, impotent folke, and weik folke;" and, later still, these same were again confined to beg within the parishes in which they were born. These restrictions were found necessary to prevent the evasion of the laws against vagrants, from whom the country suffered severely, especially during years of scarcity, who, in 1698, Fletcher of Saltoun says, amounted to 200,000. The characteristic feature of the Scottish system is, and always has been, to support the poor by collections at the church doors, and other funds voluntarily raised, and to shun assessment as a great and increasing evil.† The collection and management of the poor's funds is placed in the heritors and kirk session; and although the judge ordinary is to see the law executed, yet he cannot, in the first instance, modify an alimient to the pauper; he can only remit to the heritors and kirk session to modify one. According to a judicial determination reported by *Kilkerran*: "The heritors have a joint right and power with the kirk session in the administration, management, and distribution of all

\* C. 74.

† Money-penny.

and every of the funds belonging to the poor of the parish, as well collections as sums mortified for the use of the poor and money stocked out upon interest; and have a right to be present and join with the session, in their administration, distribution, and employment of such sums, without prejudice to the kirk session to proceed in their ordinary acts of administration, and application of their collections to their ordinary and incidental charities, though the heritors be not present nor attend.”\*

It is necessary in Scotland, as well as in England, to entitle poor persons to parochial relief, that they have a **SETTLEMENT**, which can only be acquired in one of the four following ways: I. by Residence; II. Marriage; III. Parentage; IV. Birth.

**I. RESIDENCE.**—There is scarcely any restriction as to the persons who may acquire a settlement by residence; and foreigners are equally entitled to obtain this privilege as natives. Three years’ residence in any parish is a legal settlement; but when a pauper has resided three years in another parish, it is the parish within which he has resided for the *last* three years preceding his application for charity, which is bound to support him. Mere residence is sufficient to obtain a settlement, without any of the accompanying requisites which are necessary by the law of England; such as possession of a house or estate, hiring and service, &c. Where a settlement has once been obtained, it is not lost by mere lapse of time and intermission of residence, unless a new settlement has been acquired. But so soon as a new settlement, by residence, is acquired, the parish of the former settlement is completely liberated. This will hold although the new settlement were in England. One Brown, having acquired a settlement in a Scottish parish, removed to England with his wife and family, and after living there for three years, he deserted them. In an action for aliment, at the instance of the wife and children, the court decided that the Scottish settlement was lost; and it was only on the ground that by their residence in England they had not acquired a legal settlement there, that they ultimately obtained a settlement in the Scottish parish where they had last resided for three years.

**II. MARRIAGE.**—On her marriage, a woman immediately obtains her husband’s settlement. Her maiden settlement is in consequence suspended, and does not revive by the husband’s desertion. A widow continues to hold her husband’s settlement, until she acquires a new one by residence as a widow, or by a second marriage. When divorced, a woman loses her husband’s settlement, and her maiden one revives. A settlement acquired by marriage, does not entitle her legitimate children by a former marriage to her new settlement, although it acquires this privilege for her illegitimate children.

\* Bell’s Law Dict. Art. Poor.

**III. PARENTAGE.**—Legitimate children follow their father's settlement, illegitimate children that of their mother, even where the father is known, as the law holds the father of a bastard to be uncertain. The derivation settlement of parentage ceases on the child's acquiring a settlement of his own by residence, or in the case of a daughter, by marriage, and it can never be revived.

**IV. BIRTH.**—When a pauper has no settlement, he is entitled to be supported by the parish where he was born. But they cannot have recourse on the parish of their birth if they have acquired a settlement by residence, or during the subsistence of a settlement by marriage or by parentage.

The recent act, for the amendment and better administration of the laws relating to the poor in England and Wales, has entirely altered the poor laws, and placed them on a new footing. The act is as follows:—

I. Whereas it is expedient to alter and amend the laws relating to the relief of poor persons in England and Wales: Be it therefore enacted by the king's most excellent majesty, by and with the advice, &c., That it shall be lawful for his majesty, his heirs, and successors, by warrant under the royal sign manual, to appoint three fit persons, as commissioners, to carry this act into execution, and also from time to time, at pleasure, to remove any of the commissioners for the time being, and upon every or any vacancy in the said number of commissioners, either by removal, or death, or otherwise, to appoint some other fit person to the office; and until such appointment, it shall be lawful for the surviving or continuing commissioners to act as if no such vacancy had occurred.

II. The commissioners shall be styled, "the poor law commissioners for England and Wales;" any two of whom may sit as a board with power to summon and examine witnesses, and call for production of papers on oath; but they are not entitled to inquire into any title.

III. They shall have a common seal. Rules, &c., purporting to be sealed with such seal, to be received as evidence.

IV. They must record their proceedings.

V. They must make a general report to the secretary of state yearly, and also report to the secretary of state when required.

VII. They have power to appoint assistant commissioners, and to remove the same. But they cannot appoint more than nine assistants without consent of the treasury.

VIII. Commissioners, while such, cannot sit in parliament.

IX. Empowered to appoint their own secretary, assistant secretary or secretaries, clerks, and other officers.

X. No commissioner to be appointed for a longer period than five years.

XI. Every commissioner and assistant commissioner shall take the following oath:—"I, A. B., do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and judgment, execute and fulfil all the powers and duties of a commissioner (or assistant commissioner), under an act passed in the fifth year of the reign of king William the fourth, intituled," &c. Names of commissioners and their assistants to be published in the gazette, and notification sent to the clerks of the peace, and published in every county.

XII. Commissioners may delegate powers to assistant commissioners, and also revoke them. Assistant commissioners may summon persons, and examine them upon oath.

XIII. Persons giving false evidence to be guilty of perjury; refusing to attend when summoned, guilty of a misdemeanour.

XIV. Reasonable expenses of witnesses to be paid to them out of the poor's rates of the parish interested.

XV. Commissioners have the control of the administration of relief to the poor. They are also to make rules and regulations for the management of the poor and administration of the laws for their relief. They may also suspend or alter these rules.

XVI. Forty days before general rules can come into operation, they must be submitted to one of the secretaries of state. If, during the forty days, these rules be allowed by the king in council, they can come into operation. If the secretary of state should afterwards disallow them, they shall cease to operate, but transactions in virtue of them previously are valid.

XVII. All general rules shall be submitted to parliament, by one of the secretaries of state.

XVIII. A printed copy of every rule must be sent to the overseers of each parish before they can come into operation. Every owner of property, or his agent, and rate payers, shall at all times have free access to these rules free of all charge. Any overseer, obstructing or neglecting to give them publicity, is liable to a penalty, not exceeding ten pounds nor less than forty shillings. The disallowance or withdrawal of any rule to be publicly notified.

XIX. Inmates of workhouses are not obliged to attend any religious service contrary to their religious principles.

XX. The orders of assistant commissioner are not of force till they have been approved and sealed by one of the commissioners.

XXI. The commissioners are invested with the control of those acts for borrowing money, and all acts relating to the building, repairing, &c., of workhouses. Commissioners are entitled to attend local boards and vestries, but not to order the building or hiring of workhouses, except under limitations.

XXII. Prohibited from making additions or alterations to the rules contained in the schedule to 22 Geo. III. c. 83, or in any other act, until confirmed by commissioners.

XXIII. Commissioners are empowered to order workhouses to be built, hired, altered, or enlarged, with consent of a majority of the rate payers and owners of property who are entitled to vote in any parish.

XXIV. For the repayment of money borrowed for the purpose of building workhouses, the overseers are empowered to charge the future poor rates of the parish with the amount, provided it does not exceed one year's amount of poor rates.

XXV. The commissioners are empowered to order workhouses to be altered or enlarged without the consent of the rate payers. The overseers are required to assess, raise, and levy, the necessary money, provided the principal sum does not exceed fifty pounds.

XXVI. Commissioners are empowered to unite parishes; but, notwithstanding, each parish to be chargeable for the expense of its own poor.

XXVII. Under this union, any two justices may order out-door relief to aged and infirm persons wholly unable to work.

XXVIII. When an union of parishes is proposed, commissioners are to inquire the expense of poor belonging to each parish for the three years preceding. The several parishes included in such union shall, from the time of the union, contribute to a common fund for purchasing, hiring, providing, altering, or enlarging, any workhouse, &c., for the relief of the poor of such parishes.

XXIX. Commissioners are to make inquiry of the visitors, directors, &c., of such unions as had been effected under the 22 Geo. III. c. 83, whether the poor have been relieved in or out of the union, and how the expense has been paid.

XXX. The averages to be taken in the mean time from the parliamentary returns of the actual expense of the poor of each parish.

XXXI. Repeals part of the 22 Geo. III. c. 83, s. 5, and 56 Geo. III. c. 129, part of s. 1, and of 22 Geo. III. c. 83, s. 29.

XXXII. Commissioners have power to dissolve, add to, or take from, any union; to make such rules as may be adapted to such altered state; provided the rights and interests of parishes, and claims on these, be ascertained and secured. No such dissolutions or alterations of parishes shall prejudice, vary, or affect the rights or interests of third parties; nor shall they take place unless a majority of two-thirds of the guardians of such union shall concur.

XXXIII. For the purpose of settlement, such parishes constituting an union shall be considered as one parish.

XXXIV. For the purpose of rating, an union shall be considered as one parish, provided the guardians agree and the commissioners consent. Such agreement and consent to be lodged with the clerk of the peace.



XXXV. The guardians shall ascertain and assess the value of the rateable property in such unions. Rates grounded on such assessment are to be allowed as poor rates.

XXXVI. The expenditure for the poor of such unions to be in common.

XXXVII. No union shall be formed without the previous consent of the commissioners, testified under their hand and seal.

XXXVIII. In every union, a board of guardians shall be constituted and chosen, by whom the workhouse shall be governed, and the relief of the poor administered. The guardians shall be elected by the rate payers and owners of property in the united parishes.

XXXIX. The regulation is similar for single parishes.

XL. Owners as well as occupiers are entitled to vote at elections of guardians. Votes are to be taken in writing. Votes may be taken by proxy. No rate payer is entitled to vote unless he has paid rates for one year.

XLI. Elections of guardians, visitors, and other officers, under the act 22 Geo. III. c. 83, or any local act, are to be made according to the provisions of this act.

XLII. The commissioners may make rules and regulations for any present or future workhouses. They may vary by-laws already in force or to be hereafter made. Rules which affect more than one union are to be considered as general rules.

XLIII. Justices are empowered to see by-laws enforced, and to visit workhouses, in pursuance of the act 30 Geo. III. c. 49. But where the commissioners' rules are not in force, justices, parish clergymen, &c., are not restrained from visiting, examining, and certifying the state of the poor therein.

XLIV. Buildings taken for workhouses are to be within the jurisdiction of the borough, &c., to which they belong, although the parish may not be within the jurisdiction of the borough.

XLV. No lunatic, insane person, or dangerous idiot, is to be detained in any workhouse more than fourteen days.

XLVI. Commissioners may direct overseers and guardians to appoint paid officers for parishes or unions. They may fix their duties, mode of appointment, dismissal, the security required, and regulate their salaries.

XLVII. Overseers are directed to pass quarterly accounts. Balances may be recovered in the same manner as penalties and forfeitures. But no such proceeding shall exonerate or discharge the liability of the surety.

XLVIII. Masters of workhouses and parish officers are placed under the orders of the board of guardians, and are removable by them.

XLIX. No contract shall be valid unless it be conformable to the rules laid down by the commissioners.

L. Repeals the 45 Geo. III. c. 54, respecting contracts.

LI. The penalty imposed by 53 Geo. III. c. 177, on persons having the management of the poor being concerned in any contract, is extended to persons appointed under this act.

LII. Commissioners are to regulate the relief to able-bodied paupers and their families out of the workhouse. Whatever relief overseers or guardians may give contrary to such orders is declared to be unlawful and invalid, and shall be disallowed. Under special circumstances, guardians may delay the operation, and report to the commissioners. If the commissioners disapprove of delay, they may fix a day from which all such relief shall be disallowed. In cases of emergency, guardians may grant relief in food, temporary lodging, or medicine, but must report to the commissioners within fifteen days, when such relief shall be lawful.

LIII. Repeals 36 Geo. III. c. 23. 55 Geo. III. c. 137, s. 3 and 4, and 59 Geo. III. c. 12, s. 2 and 5.

LIV. The ordering, giving, and directing of all relief to the poor of any parish shall be under the government and control of any guardians of the poor. Any justice may give order for medical relief in dangerous illness.

LV. Masters of workhouses and overseers shall keep a register of the name of every poor person in the receipt of relief out of the workhouse.

LVI. All relief given to the wife, or children under the age of sixteen, shall be considered

as given to the husband. All relief given to children under sixteen of any widow shall be considered as given to the widow.

LVII. Every man who shall marry a woman, having a child or children before marriage, whether such children be legitimate or otherwise, shall be liable to maintain them as part of his family.

LVIII. Such relief as the commissioners may direct to be given to any poor person above the age of twenty-one, or to his wife, or to any part of his family under the age of sixteen, they may direct to be considered as a loan.

LIX. Justices are empowered to summon any labourer, and to attach his wages in the hand of his employer for the recovery of such loans. Any master or employer neglecting or refusing to pay the guardian the balance of wages, justices may enforce such employer, by penalties.

LX. Repeals so much of the 43 Geo. III. c. 47, as requires relief to be given to wives and families of substitutes, hired men, or volunteers of militia.

LXI. Justices are required and empowered to certify that the commissioners' rules have been complied with in binding poor children apprentices.

LXII. Owners of property and rate payers are empowered to raise money on security of rates, for the purposes of defraying the expenses of emigration.

LXIII. The commissioners are empowered to make advances of money from exchequer bills to guardians, for purchasing, building, altering, or enlarging, any workhouses, or for purchasing land whereon to build the same, upon the security of the poor rates.

LXIV. No settlement shall hereafter be acquired by hiring and service, or by residence under the same, or by serving an office.

LXV. No person, under any contract of hiring and service not completed at the time of the passing of this act, shall acquire or be deemed to have acquired any settlement by reason of such hiring and service, or of any residence under the same.

LXVI. No settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor's rate, and shall have paid the same for one year.

LXVII. No settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, nor by any person now being such an apprentice in respect to such an apprenticeship.

LXVIII. No person shall retain any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer time than such person shall inhabit, within ten miles thereof. In case such person shall cease to inhabit within such distance, and become chargeable, he shall be removed to the parish wherein he may have previously been legally settled.

LXIX. Repeals so much of any act of parliament which enables any single woman to charge any person with having gotten her with any child of which she shall be then pregnant, or as renders any such person liable to be apprehended or committed, or required to give security, on any such charge, or as enables the mother of any bastard children to charge or affiliate any such child or children on any person as the reputed or putative father thereof, or as enables any guardian to charge or make complaint against any putative father, and to require him to be charged with or contribute to the expenses attending the birth, sustentation, or maintenance, of any such child or children. Also repeals so much of any act as renders an unmarried woman with child liable, as such, to be summoned, examined, or removed, or as renders the mother of any bastard liable, as such, to be imprisoned or otherwise punished, so far as respects any child which shall be likely to be born a bastard.

LXX. Securities and recognizances to indemnify any parish for child or children likely to be born bastards, whereof any single woman shall be pregnant at the time of passing this act, are declared to be null and void. Persons in custody for not giving security, &c., to be discharged.

LXXI. Every child which shall be born a bastard after the passing of this act, shall have and follow the settlement of the mother until such child shall attain the age of sixteen, or shall acquire a settlement in its own right. Such mother, so long as she shall be unmarried

or a widow, shall be bound to maintain such child, as a part of her family, until such child shall attain the age of sixteen. All relief granted to such child while under the age of sixteen shall be considered as granted to such mother, provided that such liability of such mother shall cease on the marriage of such child, if a female.

LXXXII. When the mother of a bastard child is really unable to maintain it, the guardians of the parish or union may apply to the general quarter sessions, for an order on the putative father, to reimburse the parish or union for its support. No money, however, is to be applied to the relief of the mother.

LXXXIII. Fourteen days' notice must be given to the putative father. If the court grants the application, the costs may be calculated from the birth of the bastard child, if within six months.

LXXXIV. If the putative father or his attorney does not appear, the court may give judgment nevertheless.

LXXXV. If suspicion arise that the putative father intends to abscond, he may be required to enter into a recognizance for his appearance.

LXXXVI. When the putative father falls into arrear, he may be proceeded against by distress or attachment of wages.

LXXXVII. Persons employed in the administration of the poor laws are not to furnish goods or provisions for their own profit in parochial relief, under a penalty of five pounds.

LXXXVIII. Sums payable by father, grandfather, grandmother, child or children, of any poor person, for the relief of poor persons, shall be recoverable in like manner as penalties and forfeitures are recoverable under the provisions of this act.

LXXXIX. No poor person shall be removed or removable till after notice of his being chargeable has been sent to the parish to which the order of removal is directed. If the parish agree to receive such poor person, it may then be lawful to remove him; but not in case he should appeal.

LXXX. In case of appeal, the overseers are entitled to have free access to the person to be removed, for the purpose of examining him touching his settlement.

LXXXI. Grounds of appeal must be stated in the notice, and sent to the respondent parish, and the appellant parish shall not be heard in support of such appeal, unless the notice is regularly given.

LXXXII. The parish which loses the appeal to pay such costs as the court shall direct.

LXXXIII. The party making frivolous and vexatious grounds of appeal, shall pay the whole or part of the costs incurred by the other party in disputing them.

LXXXIV. The parish to which the poor person shall be finally adjudged to belong, shall be liable to pay the cost and expense of their relief and maintenance.

LXXXV. The commissioners may require trustees of rates on property for the relief of the poor, to produce true and detailed accounts in writing; which accounts, or a copy, shall be open for the inspection of the owners of property and rate payers.

LXXXVI. Advertisements in the gazette and local newspapers are not liable to stamp duty.

LXXXVII. Bonds and securities made pursuant to the act 22 Geo. III. c. 83, and assignments thereof, are exempted from stamp duty.

LXXXVIII. All letters to and from the board of commissioners to be free of postage, if marked on the corners with the words, "Office of poor law commissioners pursuant to act of parliament, passed in the fifth year of the reign of his majesty king William the fourth." Letters transmitted under these covers, which do not relate solely to the business of this act, to be transmitted to the post office to be charged with postage.

LXXXIX. All payments, charges, and allowances, made by the overseers or guardians contrary to the provisions of this act, or at variance with any of its rules, orders, or regulations, shall be illegal.

XC. A summons left at the usual or last known place of abode shall be sufficient.

XCI. Repeals so much of the act 6 Geo. IV. c. 80, as relates to the prohibition of spirituous liquors in workhouses.

XCII. Persons introducing spirituous liquors into workhouses are liable to a penalty not exceeding ten pounds.

XCIII. Masters of workhouses allowing the use of spirituous liquors, inflicting corporeal punishment, or otherwise ill using any adult person, or guilty of any other misbehaviour or misconduct themselves towards any poor person in the workhouse, on conviction, shall pay any sum not exceeding twenty pounds, as the justices shall direct. And justices may order salaries, &c., to be stopped till such penalties are paid.

XCIV. The two preceding clauses are to be hung up in a conspicuous place in each workhouse, and renewed when soiled.

XCV. Overseers or their assistants disobeying guardians are liable to a penalty not exceeding five pounds.

XCVI. No overseer, &c., shall be liable to any penalty or prosecution for disobeying illegal orders.

XCVII. Overseers, &c., purloining, embezzling, wilfully wasting, or misapplying, any of the monies, goods, or chattels, belonging to any parish or union, shall be liable to a penalty not exceeding twenty pounds, and forfeit treble the amount so embezzled, &c.

XCVIII. Every person wilfully disobeying the rules, orders, and regulations, or are guilty of contempt of the board of commissioners, shall forfeit and pay a sum not exceeding five pounds for the first offence, any sum not exceeding twenty nor less than five pounds for the second offence, and for the third and every subsequent offence he shall be indicted for a misdemeanour, and, on conviction, pay not less than twenty pounds, and suffer imprisonment with or without hard labour.

XCIX. All fines and forfeitures are leviable by distress and sale, and when recovered shall be applied for the use of the parish or union where the offences were committed.

C. Owners and rate payers are declared to be competent witnesses in proceedings for the recovery of penalties, &c.

CI. Justices may in all cases proceed by summons for the recovery of penalties.

CII. Want of form in the proceedings shall not be deemed unlawful in recovering damages by distress, nor shall the party distraining be deemed a trespasser *ab initio* on account of any irregularity which shall happen in making the distress; but the person aggrieved may recover full satisfaction in an action on the case. But no plaintiff shall recover for irregularity, if tender of amends be made.

CIII. Aggrieved parties may appeal to the quarter sessions against any order or conviction of parties, within four calendar months after cause of complaint.

CIV. No action or suit shall be commenced against any commissioner, &c., until twenty-one days' notice has been given in writing to the party to be prosecuted. In such action, the defendant may plead the general issue.

CV. The commissioners' rules, &c., may be removed by certiorari to the court of King's Bench, but they shall continue in force until they are declared to be illegal.

CVI. Notice, in writing, must be left at the office of the commissioners, ten days before application be made for a writ of certiorari.

CVII. Previous to issuing a writ of certiorari, the parties applying for it must enter into recognizance with sufficient sureties in the sum of fifty pounds. If the rule, &c., be declared legal, the commissioners shall be entitled to costs.

CVIII. If rules are quashed, the same shall be notified to parishes or unions to which such rules have been directed.

CIX. This clause relates to the interpretation of the words: "auditor," "general rule," "guardian," "justice or justices of the peace," "oath," "orders and regulations," "officer," "overseer," "owner," "rack rent," "parish," "person," "poor," "poor laws" or "laws for the relief of the poor," "poor rate," "general quarter sessions," "union," "united workhouse," "vestry," "workhouse." In describing any person or party, matter or thing, whenever the word importing the singular number, or the masculine gender, only is used, the same shall be understood to include, and shall be applied to several persons or parties, and females as well as males, and several matters or things, respectively, unless there be something in the subject or context repugnant to such construction.

CK. Provides for the alteration, amendment, or repeal, of this act in the session wherein it was made.

## TITHES.

ON this subject we will be extremely brief. From the beginning of the world, God himself consecrated a *seventh* of our *time*, for the purposes of rest and worship. For the support of his worship, it was also necessary to consecrate a portion of our worldly substance. In the first act of public worship which we find recorded in holy scripture, Cain and Abel each brought a portion of their wealth, as an offering to God. Our time is uniformly the same in all nations and climates, and therefore the law which claims a seventh is clearly laid down: *Remember that thou keep holy the Sabbath day*. But our substance varies, according to the circumstances of time and place, of wealth and ability, of soil and climate, of manners and customs; and all these, again, are subject to innumerable changes and revolutions. All these circumstances cause a vast variety in proportioning the part to be separated to the support of God's worship; and therefore God, of his infinite mercy and goodness, charged mankind with the *general duty* only of setting apart for his worship such a proportion of our substance as may be sufficient for its support. Abraham, on his return from the conquest of the four kings, paid a *tithe* of all that he had to Melchizedek, the priest of the Most High God. When Jacob avouched the Lord Jehovah to be his God at Bethel, he bound himself to pay tithes: "And this stone which I have set for a pillar shall be God's house, and of all that thou shalt give me *I will surely give the tenth unto thee*;"\* which shows that the worship of God, and the payment of tithes for the support of that worship, invariably went together. Under the law, tithes were part of the offerings unto the Lord, and they are called *his inheritance*: "But the tithes of the children of Israel, which they offer as an heave-offering unto the Lord, *I have given to the Levites to inherit*; therefore I have said unto them, among the children of Israel they shall have *no inheritance*."† "The priests, the Levites, and all the tribe of Levi, shall have no part nor inheritance with Israel; they shall eat the offerings (tithes) of the Lord made by fire, *and his inheritance*."‡ Among the heathen, the same thing was done for the support of their idol worshippers. Mr Selden, a great lawyer in the time of Oliver Cromwell, and a decided enemy of the church, shows that the Syrians, Phenicians, Arabians, Ethiopians, Greeks, Romans, and almost all other nations, paid tithes and offerings to the priests of their false deities. This knowledge they could only have acquired by traditionary accounts, floating down the stream of time, from the first institution of revealed religion in our great

\* Gen. xxviii. 22.

† Num. xviii. 24.

‡ Deut. xviii. 1.

ancestor. And therefore we must conclude, that the payment of some portion of our substance was appointed of God. Whatever we possess is his gift. God reserved the tenth of our substance as a tribute to himself, and an acknowledgment of his sovereignty and dominion. The payment of tithes is part of the worship of God, and as we cannot pay them *immediately* to God, he has ordained that we shall pay them *mediately* to his ministers, who are his ambassadors and earthly representatives. As before mentioned, he has reserved a *seventh* of our *time*, that is Sunday, for his worship, and a portion of our substance for the maintenance of those who “serve at the altar.” And therefore God called the tithes, which the eleven tribes paid to the tribe of Levi, HIS INHERITANCE. The tribe of Levi had no other inheritance or property whatever but the tithes. When the Jews began to murmur against the payment of tithes, and to withhold them, he sent the prophet Malachi to tell them that they had *robbed him*: “Will a man rob God? yet ye have robbed me. Ye say, wherein have ye robbed me? IN TITHES AND OFFERINGS. Ye are accursed with a curse, *for ye have robbed me*, even this whole nation.”\*

In the times of the apostles, and during the first ages of christianity, many that were possessors of lands and houses sold them, and laid the price at the apostles' feet. And to the end of the fourth century, the devotion of the people was so great that their offerings and oblations considerably exceeded what the tenth would have been, had they paid a regular tithe. The general duty of providing a maintenance for the christian ministry, is most strictly enjoined in the New Testament. When Christ sent forth his apostles and disciples to preach the gospel, he commanded them to take “no money in their purses, nor scrip,” that is, provision, “neither two coats, nor shoes, nor yet staves, for the workman is *worthy* of his meat.”† And to these repeated commands of our Saviour, St Paul adds both reasoning and command. “For it is written in the law of Moses, Thou shalt not muzzle the ox that treadeth out the corn. Doth God take care for oxen? or saith he it altogether for our (the ministry's) sakes? For our sakes, no doubt, this is written; that he that ploweth should plow in hope, and that he that thrasheth in hope should be partaker of his hope. If we have sown unto you *spiritual* things, is it a great thing if we (the ministers) shall reap your *carnal* things? If others (the heathen priests) be partakers of this power over you, are not we rather? Do ye not know, that they which minister about holy things, live of the things of the temple, and they that wait at the altar are partakers with the altar? *Even so hath the Lord ordained*, that they which preach the gospel, should live of the gospel.”‡ In these commands, tithes are not

\* Mal. iii. 8, 9.

† Matt. x. 10.

‡ 1 Cor. ix. 9--11.

mentioned; only the general duty of maintaining the ministers of religion. The evangelical or gospel ministry is after the order of Melchizedek. They claim tithes, or a maintenance in some shape, as their right, and as being due to that order which is a superior and a more exalted priesthood than that of Levi. Our Saviour was of the tribe of Judah, and therefore did not belong to the order of the Levitical priesthood. Of Judah, "Moses spake nothing concerning the priesthood."\* But Christ was a priest after the order of Melchizedek, to whom faithful Abraham paid tithes long before Levi was born. "And as I may so say, Levi also, who received tithes, payed tithes in Abraham. For he was yet in the loins of his father when Melchizedek met him."† The ministers of the gospel have therefore a divine right to a maintenance. To the Jews a tenth part was set apart by God himself, as his *inheritance*, and therefore the Jewish church possessed tithes by divine right. The christian ministry have an equally divine right to a sufficient maintenance to support them in such a manner as may best operate to the glory of God and the salvation of men. Although a tenth is not specified in the New Testament, yet, as the christian church followed the Jewish in its order, all christian nations have followed it also in appropriating a tenth of the produce of the soil as *God's inheritance*. But it does not signify what name we give it, or in what shape we pay it, it still remains God's inheritance. It is all one whether it is a tithe taken in kind, or a stipend paid in money, or an offering at the church doors, or in seat rents. In all these cases the *object* is the same—the glory of God and the salvation of men. We are thereby paying tribute to God, "according as we are disposed in our heart, not grudgingly or of necessity, for God loveth a cheerful giver."

Mr Selden himself acknowledges, "that before the end of the fourth century, it became the usual phrase, to offer tithes, because they were paid in the offerings of the faithful, who thought themselves obliged, in the making of these offerings, to give every year unto the churches of which they were members, tithes, or greater parts, of their annual increase, for the support of God's worship in them."‡ Before the end of the fifth century, the only obligation on the people to maintain their offerings were the admonitions of conscience. After the inroads of the barbarians on the Roman empire, this part of the worship of God was much neglected. And therefore synods and general councils resorted to the spiritual sword to enforce the payment. In the year 585, the council of Alascon made a solemn decree, enjoining the whole kingdom of France "to pay the tithes of their fruits to holy places, under the anathema, that "if any one shall be contumacious to these our most wholesome orders, let him be for ever

\* Heb. vii. 14.

† Heb. vii. 9, 10.

‡ Hist. of Tithes, c. 5.

separated from the communion of the church." A similar canon was made at Seville, in the year 590, for the kingdom of Spain, enjoining the payment of "tithes of all cattle, fruits, and labour of men;" and decreed that whoever subtracted the tithes should be accounted "a robber of God, and a thief, and that the curse which God inflicted on Cain, who did not divide aright unto God his portion, be heaped upon him." To the same purpose, the council of Friuli, in 791, ordained tithes to be paid in Italy. About the middle of the eighth century, Egbert, archbishop of York, made a canon for his province,\* ordaining the payment of tithes, and commanding his clergy to teach the people how to perform that act of worship. In the year 784, a general council of the whole kingdom, held at Calcleuth, ordained the payment of tithes. The 17th canon of which says: "Wherefore, with earnest beseeching we enjoin, that all do carefully endeavour to pay tithes of all that they do possess, (because they are the peculiar property of the Lord our God,) and maintain themselves and give alms of the other nine parts."† In the year 794, Offa, king of Mercia, gave the tithes of all his kingdom to the church. This establishment did not extend beyond the kingdom of Mercia. But Ethelwolf, who succeeded Egbert, under whom the heptarchy was united into one kingdom, enlarged Offa's gift to the whole realm of England. On this gift the civil right of tithes in England is founded. Ethelwolf held a parliament at Wilton, in the year 854, at the feast of Easter, and, with the full consent of his parliament, gave *for ever* to God and his church the tithe of all goods, and the tenth of all the lands of the kingdom, free from all secular service, taxations, and impositions, whatsoever. This being the grand civil charter by which the church in England holds the tithes, I here give it at length as recorded by Mathew Paris:

"I, Ethelwolf, by the grace of God, king of the West Saxons, in the holy and most solemn feast of Easter, for the health of my soul, and the prosperity of my kingdom, and all the people by Almighty God committed to my charge, have, with my bishops, earls and all other my nobles, brought to pass this wholesome counsel, that I have not only given the tenth parts of the land through my kingdom to the holy churches, but also have granted to our ministers placed in them to enjoy them in perpetual liberty, so that this grant shall remain *firm* and *immutable*, freed from all royal services, and from all other secular service whatsoever. And it hath pleased Elstan, bishop of Sherburn, and Swithen, bishop of Winchester, and the rest of the chief men, to give their consent hereto. This we have done for the honour of our Lord Jesus Christ, and of the blessed Virgin Mary, and of all the saints, and for the reverence which we bear to the feast of Easter, that almighty God may vouchsafe to be propitious to us, and to our posterity. This charter was written in the year of the incarnation of our Lord Jesus Christ, 854, in the second indiction, on Easter day, in our palace called Wilton. Whosoever shall augment this our donation, may God augment to him his prosperous days; but if any one shall presume to diminish or change it, let him know

\* The province of York at that time extended from the river Humber to the firths of Forth and Clyde.

† Cited by Seldon and Prideaux.



that he must give an account hereof before the judgment seat of Christ, unless in the interim he doth make amends by giving satisfaction for the same.

+ I, **ETHELWOLF**, the king, + I, **ELSTAN**, bishop, + I, **SWITHIN**, bishop, + I, **WULF-LOR**, abbot, + I, **WERFORD**, abbot, + I, **ETHERIN**, and I, **ALFRED**, the king's sons, have given our consent hereto."

This charter was tendered by the king, on his knees at the altar, in the presence and with the consent of the estates of the kingdom, under heavy curses and imprecations on himself and any of his successors who should either alienate or encroach on this *inheritance* given to God. Many acts of subsequent parliaments have confirmed and guaranteed this charter. At that period, the sole right of property in all the lands in the kingdom was vested in the sovereign; so that Ethelwolf gave what was, strictly and legally speaking, his own property to the church for ever. All the lands in the kingdom came into the possession of their present owners, burdened by the payment of tithes. The tenth, being unalienable, cannot be sold; but the other nine parts may change hands as often as necessary. In the purchase of land, the buyer only bargains for nine parts; the tenth he does not purchase nor pay for. It remains with its never-ceasing proprietor—the church. It is therefore evident, that the church has an unalienable right to tithes. They are her estate, guaranteed by the most solemn compacts of princes and parliaments. No man in the kingdom can show title deeds so old as Ethelwolf, for his nine parts of the land. But the foregoing is the church's title deeds for her tenth. The revenues of the Church of England have been much exaggerated. They are far from being immoderate, even were they in all cases fully paid. But the clergy seldom, if ever, obtain the full amount of their due. In almost every case they are obliged to sacrifice a great portion of their just rights for the preservation of peace and charity. In England, the clergy are subject to the same imposts and public burdens as the laity. They pay the poor rates the same as the laity. The poor rates are the birthright—the freehold estate of the poor. The tithes are the freehold of the clergy, and open to be acquired by all ranks in the kingdom. The poor and the clergy are both merely liferenters: yet the title of the poor reaches no farther back than the 45th of Elizabeth, whereas that of the clergy to the reign of Ethelwolf, in the year 854.

By Blackstone, tithes are called, "a species of incorporeal hereditaments." They are defined to be a *tenth* part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants. The first species being usually called *prædial*. The *prædial* tithes consist of corn, hay, grass, hops, fruit, herbs, and wood, including tithe for the agistment of cattle. The second species is called *mixed*. It consists of wool, calves, lambs, pigs, chickens, milk,

eggs, and other natural products, but matured and preserved in part by the care of man. The third species of tithe is usually called *personal*. It is such as springs from manual occupations, as trade, fisheries, and the like. The first two species must be paid in gross; of the third, only the tenth part of the clear or nett gains or profits are due. 'Tithes are divided into great and small. *Great* tithes are those of corn, peas, beans, hay, wood, &c. *Small* tithes comprehend all the other species of prædial tithes, together with those called personal or mixed. The distinction of *great* and *small tithes* depends on the nature and quality of the thing, and not upon the place or mode of cultivation, or the quantity produced, or the use to which it is applied. The only criterion for determining what are great, or small, or vicarial tithes, is by endowment or prescription. When endowment is pleaded, it must be produced. Prescription is founded on a supposed endowment, which has been lost. In some parishes, grass, hay, and wood, are great tithes, whereas in others they are small tithes, according to prescription, which has been founded on an endowment, or such usage as presupposes an endowment.

Great tithes are commonly called *parsonage* tithes, being payable to the parson or rector. Small tithes, being in general payable to the vicar, are usually called *vicarial* tithes. *Prima facie*, the rector is entitled to ALL the tithes of the parish, and nothing can be presumed in the vicar's favour without endowment or prescription. As a general rule, tithe ought to be paid as soon as the tenth part can be severed from the whole, unless there be any custom to the contrary, as often as a renovation or fresh crop is severed from the same land in the course of the year. The titheholder, or his deputy, has a right to see that the same is fairly set forth from the other nine parts, before any particle of those nine parts is removed from the field. In general, tithes are to be paid for anything that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for anything that is of the substance of the earth, or is not of annual increase. Under this last head is comprehended stone, lime, coal, ores, and the like. No tithe is to be paid for creatures that are of a wild nature, as deer, hawks, &c., whose increase is not natural, but casual; but tithes may be paid for deer and rabbits, if such has been the custom.

There are two methods by which lands and their occupiers may be exempted from the payment of tithes: first, by real composition; secondly, by custom or prescription.

I. *A real composition* is when an agreement is made between the owner of the lands and the parson or vicar, with the consent of the bishop or patron, that such lands for the future shall be discharged from payment of tithes, by reason of some land, or other real recompense, given to the parson in lieu and satisfaction thereof. These real compositions

have ever been held and allowed in England to be a good discharge of the payment of tithes. Hence have arisen all such compositions as exist at this time by form of the common law. By this means the possessions of the church were daily diminished. To obviate this, the disabling statute was passed in the reign of Elizabeth,\* which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches for more than three lives, or twenty-one years. By virtue of this statute therefore, no real composition, made since the 13th of queen Elizabeth, is good for any longer period than three lives, or twenty-one years, even although it should be made with the consent of the patron and ordinary. This statute has effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament. A composition established even by act of parliament, if made since the disabling statute of Elizabeth, and confirmed by a decree of a court of equity, though good for the life of the incumbent, is not binding on his successor. If the successor continues to receive the next payment due after the death of his predecessor, he is accountable to the executors only for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to, and not *pro rata* according to the time which had run before his death from the last payment. Neither is the succeeding incumbent bound by a lease made conformable and prior to the disabling statute, but such lease is entirely void at the decease of the parson or vicar who made it.

II. *A discharge by custom or prescription* is, when time out of mind, such persons or such lands have been either partially or totally discharged from the payment of tithes. This immemorial usage is binding upon parties. It is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom is either *de modo decimandi*, or else *de non decimando*. A *modus decimandi*, called shortly a *modus*, is a composition for tithes in kind within a certain district. By this *modus* a layman is discharged from rendering his tithes, on his paying to the parson, in lieu thereof, what the local custom of that place directs. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land. Sometimes it is a compensation in work and labour, as that the parson shall only have the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him. Sometimes, in lieu of a large quantity of crude and imperfect tithe, the parson shall have a less quantity, when arrived to a greater maturity, as a couple of fowls in lieu of tithe eggs, and the

\* 13 Eliz. c. 10.

like. A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king, by his prerogative, is discharged from all tithes. So a vicar shall pay no tithes to the rector, nor the rector to the vicar. The manner or form of setting out for payment of tithes, is generally governed by the custom of the place. In a special case it was held, that a farmer may cut down a field in portions most convenient for himself, provided it be not done vexatiously, and with a design to trouble the clergyman. He must not, however, proceed to carry away such separate cuttings before he has set out the tithe of all the cuttings. It is a general rule, that a farmer may not at his pleasure tithe, and carry *part* of a field of corn before the whole has been tithed, and then proceed to another field, so as to oblige the parson to come to the field at another time to take his tithe. But still there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe and carry the whole of that part of the field lying in one parish before tithing any part of the same field in another parish; and this without previous notice of his intention to carry such part. The general rule, that the farmer must not carry part of the crop of a field of corn before the whole has been tithed, must be understood with all necessary exceptions of partial ripeness, and whether the neglect of taking the advantage of which would be prejudicial to the crop. The parson, vicar, impropriator or farmer, cannot come himself and set forth his tithes without the license and consent of the owner. If he tithe of his own head the corn or hay of any land holden within his parish, and carry it away, he is a trespasser, and an action will lie against him for it. But every person is bound, of common right, to cut down and set out the tithes of his own lands. That it may be done faithfully and without fraud, the laws of the church entitle the parson to have notice given him. It was enacted in the reign of Edward VI., that at all times whensoever, and as often as any prædial tithes shall be due, at the tithing of the same it shall be lawful to any party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes justly and truly set forth and severed from the nine parts. It has been held in law, that the parishioner must have his nine parts a reasonable time in the field for the parson to compare the tithe with them. It has been also held, that if the parishioner reaps one land, and in coming back along the same land to reap the next, throws out the tithe of the first, and shocks his nine sheaves, he does not give a sufficient time for the parson to compare. But if, after due notice, the tithe owner does not come in convenient time, it is his own fault, and he will lose the benefit of making the comparison. The care of the tithes, as to waste or spoiling, after severance, rests upon the parson, and not upon the owner or occupier of the land. The parson is by law at his peril to

take notice of the tithes being set out. It has been declared, that although the parishioners ought *de jure* to reap the corn, yet they are not bound to guard the parson's tithes. After the tithes are set forth, he may, of common right, come himself, or send his servants, and spread abroad, dry, and stack, his corn, hay, or the like, in any convenient place or places upon the ground where the same grew, till it be sufficiently withered and fit to be carried into the barn. But he must not take a longer time for so doing than is "convenient and necessary." By the statute of Edward VI. "It shall be lawful quietly to take and carry the same away. And if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth, or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid; and if any person do stop or let (hinder) the parson, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes, as is above said, he shall forfeit double value with costs, to be recovered in the ecclesiastical courts." The parson may carry his tithes from the ground where they grew, either by the common way, or any such way as the owner of the land uses to carry away his nine parts. If, after he has duly set forth his tithes, the owner of the soil will stop up the ways, and not suffer the parson to carry away his tithes, or to spread, dry, and stack them upon the land, this is no good setting forth of his tithes, without fraud, within the statute. In consequence, the parson may have an action upon the said statute, and may recover treble the value; or he may have an action upon the case for such disturbance; or he may, if he will, break open the gate or fence which hinders him, and carry away his tithes. But in this he must be cautious, that he commit no riot, nor break any gate, rails, locks, or hedges, more than he necessarily must for his passage. When he comes with his carts, wains, or other carriages, to carry away his tithes, he must not suffer his horses or oxen to eat and depasture the grass growing or cut. But if his cattle do in their passage, against the driver's will, here and there snatch some of the grass, this is excusable. If tithes set forth remain too long upon the land, the owner of the soil may distrain them as damage feasant. If he be sued for them in order to justify, he must set forth how long they had remained before he took them. When they shall be said to remain too long is tryable by a jury. An action upon the case will lie against the parson for his negligence in this behalf. No action, however, in such a case will lie, unless the parishioner has duly set forth his tithes, and has also given notice to the parson that they are so set forth.

The period of the establishment of tithes, or teinds, in Scotland, is involved in some degree of uncertainty. Spottiswood asserts, that Convallus appointed tithes to be paid universally in his reign, which was in the sixth century; while Craig affirms, that teinds were introduced only a short time

before the Lateran council, in 1179. The history of Scottish tithes, or teinds, is naturally divided into three periods: I. Preceding the Reformation; II. Between the Reformation and the introduction of valuation and sales; III. The period subsequent to the commencement of valuation and sales.

I. *Personal* teinds were unknown in Scotland. Teinds were altogether *prædial*, affecting the fruits of the land, and are either *natural* or *industrial*. Industrial teinds correspond to the *mixed* tithes in England. Till the teinds were regulated by the valued rental, there was hardly any tithing of natural fruits. *Prædial* tithes, therefore, of industrial fruits, have all along constituted the whole teinds leviable by the church of Scotland. There have been, however, some local and consuetudinary exceptions. They consisted of the tenth of all profit produced by the application of industry to land. Glebes, temple lands, lands belonging to the religious orders, were excepted; and also lands, the proprietors of which have acquired their teinds originally from churchmen. They were leviable without any deduction, *propter curam et culturam*, in favour of the possessor. They were of two kinds, *parsonage* and *vicarage*. The *parsonage* teinds were due exclusively to the parson, or others having right to the parochial benefice, and were leviable from corn alone, at the terms of Whitsunday and Michaelmas. *Vicarage* teinds were paid to the vicar, if originally appointed by the patron; yet where he was not, they also went to the incumbent, who might make what agreement he pleased with curates or assistants of his own appointment. The *vicarage* teinds were drawn from all the minor fruits, such as cattle, fowls, eggs, milk, hay, lint, fishings, &c. These were not levied according to a certain fixed rule, as the *parsonage* teinds were, but according to the usage of every individual benefice or parish. Before the Reformation, the church enjoyed tithes or teinds *de jure communi*, and had besides extensive landed property. But the teinds were by degrees almost entirely carried away from their proper destination: 1. by the consecration of tithes to other churches or churchmen unconnected with the lands; 2. by papal exemptions; 3. by infeudation of tithes to laymen. The useful and laborious parochial clergy were reduced to a state of comparative indigence. It frequently happened that, in the vacancy of parochial charges, the patrons appropriated great part of its tithes to some favourite monastery. The right of presentation was likewise frequently conveyed away to monasteries, making them the perpetual beneficiary of the church annexed. To the very great injury of religion, the pope usurped the patronage of all those parishes where no one else could show a valid right of presentation. He naturally threw as much power into the hands of religious bodies, exempted their land from tithes, and thus directly robbed the parochial clergy of their just rights. Patrons fre-

quently made grants of the tithes to needy laymen. The religious houses also sold the tithes to the crown or other laymen. Leases were also granted of the tithes at a low rate, on payment of a fine. Various measures were, at different times, ineffectually adopted to check this systematic spoliation of the parochial clergy.

II. At the Reformation, the crown became the proprietor of all the church lands, either by resignation or confiscation, especially of those belonging to the religious houses. On the death or dispersion of the abbots and priors, the crown appointed lay commendators for life. The monasteries and priories were then turned into temporal lordships. These men were styled "Lords of erection," or "Titulars of the tithes," into whose hands the possessions of the church were permanently transferred. At the same time, the crown assumed the place of the pope, and became patron of every regular parochial charge to the patronage of which no subject could show a good title. The lords of the new erection continued to exercise the rights which their predecessors, the abbots, had formerly exercised. They presented ministers to parishes, and assigned such stipends as they chose. In 1587, a check was put to the practice of erections, and all church lands were, by act of parliament, unalienably annexed to the crown. The following exceptions were made: 1. the temporal lordships erected by the crown prior to the date of the act; 2. lands made over to hospitals, schools, and universities, and not diverted from their original uses; 3. benefices which, before the Reformation, had been retained by the original lay patrons; 4. The manes and glebes of the popish churchmen which were not annexed, and were reserved for their protestant successors. This did not altogether prevent new erections. On the restoration of the bishops, the annexation of their benefices and those of their chapters were rescinded by acts of parliament.\* It appears, that after the Reformation the whole teinds of the country belonged either to the *crown*, to the lords of erection, called *titulars*, to the *patrons*, or to the *feuars* from the church. The whole rights of the church were thus transferred to, and vested in, these several parties.

III. The teind was originally made by *drawing* it. That is, the beneficiary carried off every tenth sheaf from the ground. It became a frequent custom to commute the tithes, either for a certain yearly tack duty, or a certain number of *rental bolls*, to which both parties were, under certain limitations, bound permanently to adhere. It frequently happened, that the beneficiary vexatiously delayed to draw his teind, for the purpose of making better terms with the occupier in any agreement for a commutation. Parliament attempted various remedies, all of which were inoperative

\* 1606, c. 2, 1617, c. 2.

Charles I. therefore, soon after his accession, revoked all grants of church lands, or of tithes, made by James VI. to the prejudice of the crown. It was determined, year after year, to reduce all the erections, both those before and those after the act of annexation: 1. the titulars were required to yield the superiority of the church lands to the crown, when a certain annuity should be paid out of the tithes to the crown; 2. the titulars (beneficiaries) were required to sell the tithes to the proprietor, at a fixed number of years' purchase. Tithes set aside yearly for the support of the clergy, universities, schools, and hospitals, should be valued at the suit of the proprietor, who should have the entire management of the crop, stock, and tithe, on payment either of the price or of the valued yearly duty.

In 1628, all the parties interested entered into four submissions, referring to the king himself as arbiter. The lords of erection, with their tacksmen and the landlords, signed the first and fourth; the bishops and clergy signed the second; and the commissioners of several royal burghs signed the third. On the 2d September, 1629, the king pronounced separate decrees-arbitral. The first and fourth declare the king's right to the superiorities of erection, resigned to him by their submission. He agreed to give a thousand merks to the lords of erection, as the purchase money of each yearly chalder of feu-farm; or each a hundred merks of yearly feu-duty, or other rent of superiority. After deducting an equivalent to the blench-duties, the feu-duties were to be retained until payment. There remained the other important provision, *viz.*, the power given to the heritor to have his teinds valued, and his yearly charge permanently fixed, and also to bring an action of sale against the titular or his tacksmen. The rule fixed for the first was, that where on the one hand the teind was of necessity united with his other stock in one common valuation, the yearly duty payable by the heritor to the titular or beneficiary should be *one-fifth of that whole annual valuation of the rent of stock and tithe together*. This fifth was deemed a reasonable *surrogatum*, in place of a tenth of the whole increase. On the other hand, where the tithe was drawn every harvest by the titular, and its value thus admitted yearly of a proof separate from that of the stock, the commissioners appointed for the valuation of the teinds were to bring proof of its amount, and take its value *communibus annis*. The proprietor was to pay this value annually to him who had the right to the teind. From which was to be deducted a fifth, called the *king's case*, because granted in his awards as an allowance of abatement to the proprietor. Where the teinds, though drawn *ipsa corpora*, had been mixed with others so as to prevent discrimination, or where the titular was not a party, their value was to be taken at one-fourth of the valued rent of the heritor's stock. Respecting the second the rule was, that when the seller, *e.g.* the titular had an heritable and unburdened right to his



tithes, he should be obliged to sell for nine years' purchase. Where the teinds were enjoyed by tackmen, or when the purchaser himself was tacksman, the commissioners should allow a deduction, regulated by the endurance of the tack (lease). This was so arranged that while the titular or other seller received his purchase money at the expiration of the lease, the tacksman, whether the purchaser or a third party, retained in the one case, and drew in the other, the interest of the price during the currency. The grain, in which teinds have been already valued, must be valued at the medium fiars for seven years preceding. The king's decrees-arbitral on the other submissions were much to the same effect, except that the king's power of valuation extended to those of the bishops' tithes which they did not actually possess by rental bolls, or drawn tithe, but which were in lease or other use of payment. In 1637, Charles I. appointed commissioners to fix the royal annuity. In order that the decrees arbitral in the valuation of tithes might be executed under the authority of a proper court, a commissioner was appointed \* with power generally to value and sell tithes, and approve the valuation of these subcommissioners. Valuations were carried on for a long time under it. Part of the records were carried off by Cromwell, and others were lost by fire in 1700. The commission was renewed in 1707 to the judges of the court of session. They approved of the valuation of the subcommissioners; but which may be derelinquished by the voluntary introduction of a different *amount*, but not *mode*, of payment to the minister or titular. A decree of the high commission cannot be derelinquished.

The teinds vested in lay patrons are in a different situation from those vested in the titulars. When they were deprived of the right of presentation,† all those tithes of the parish which had not previously been disposed of were bestowed on them as an equivalent. When their right of presentation was restored,‡ their right to these teinds was confirmed. They were burdened, however, "always with the minister's stipend, tacks, and prorogation already granted of said teinds, and of such augmentations of stipend, future prorogations, and erections of new kirks, as shall be found just and expedient, providing the said patrons, getting right to the teinds by virtue of this present act, and who had no right thereto before, shall be, like as they are hereby obliged to sell to each heritor the teinds of his own lands at the rate of six years' purchase, as the same shall be valued by a commission for valuation of teinds." By this act, the heritor is in all cases entitled to have his teinds valued. He buys them from the titular at nine years' purchase, and from the patron at six years' purchase. This last privilege belongs to the heritor alone. There are certain teinds, however,

\* By act 1633, c. 19.

† Act 1649, c. 30.

‡ Act 1690, c. 23.

which, though they may be valued, can never be bought by either the heritor or feuar of the titheable lands.\* These are : 1. teinds which have either been allocated to or belonging to ministers ; 2. teinds granted to colleges or schools ; 3. teinds, formerly belonging to bishops, which, on the abolition of episcopacy as an establishment merged in the crown ; 4. teinds which the heritor is bound to pay to a former heritor or titular, his superior.

As to the mode in which the established clergy of Scotland are provided for out of the tithes, it may be observed, that there were formerly two descriptions of clergymen ; the first, those of the bishops' mensal churches, and depended sometimes on the bishops, sometimes on the crown, but since the Revolution have permanent stipends modified by the commissioners, from the bishops'—now the king's—tithes. The stipends of the second, since their original appointment, had never been given out, and therefore they remained the proprietors of the full tithe. It was given to the patron † as a *solatium* for his loss of presentation, burdened with a stated provision out of these tithes for the parish minister. Every parochial minister in Scotland is therefore in fact a stipendiary either from the crown, the titular, or the patron.

\* By act 1690, c. 30.

† Act 1649, c. 39.

‡ Prideaux on Tithes.—Blackstone's Commentaries.—Selden on Tithes.—Sir S. Degges' Parson's Councillor.—Johnson's Clergyman's *Vade-mecum*.—Gibson's Codex.—Watson's Clergyman's Law.—Sir John Connell on Tithes.—Bell's Law Dictionary.—Erskine's Institutes.—Statutes at Large.



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THE END.

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